DOCKET

No. 07-665

Title:	Pleasant Grove City, Utah, et al., Petitioners v. Summum
Docketed:	November 20, 2007
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(06-4057)
Decision Date:	April 17, 2007
Rehearing Denied:	August 24, 2007

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 20 2007	Petition for a writ of certiorari filed. (Response due December 20, 2007)
Dec 18 2007	Order extending time to file response to petition to and including January 22, 2008.
Dec 20 2007	Brief amici curiae of Commonwealth of Virginia, Eight Other States, and Puerto Rico filed.
Dec 20 2007	Brief amici curiae of Cities of Casper, Wyoming, Santa Fe, New Mexico, and Ogden, Utah filed.
Dec 20 2007	Brief amicus curiae of American Legion, et al. filed.
Jan 7 2008	Order extending time to file response to petition to and including February 21, 2008.
Feb 21 2008	Brief of respondent Summum in opposition filed.
Mar 7 2008	Reply of petitioners Pleasant Grove City, Utah, et al. filed.
Mar 12 2008	DISTRIBUTED for Conference of March 28, 2008.
Mar 31 2008	Petition GRANTED.
Apr 28 2008	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the petitioners.
Apr 29 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including June 16, 2008.
Apr 29 2008	The time within which to file respondent's brief on the merits is extended to and including August 15, 2008.
May 1 2008	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Jun 12 2008	Joint appendix filed. (Statement of costs filed)
Jun 16 2008	Brief of petitioners Pleasant Grove City, Utah, et al. filed.
Jun 19 2008	Brief amicus curiae of Foundation for Free Expression filed.
Jun 23 2008	Brief amici curiae of American Humanist Association, et al. filed.
Jun 23 2008	Brief amicus curiae of United States filed.

Jun 23 2008	Brief amici curiae of Alliance Defense Fund, et al. filed.
Jun 23 2008	Brief amici curiae of Center for Inquiry, et al. filed.
Jun 23 2008	Brief amicus curiae of City of New York filed.
Jun 23 2008	Brief amicus curiae of International Municipal Lawyers Association filed.
Jun 23 2008	Brief amici curiae of Virginia, et al. filed.
Jun 23 2008	Brief amicus curiae of Cities of Casper, Wyoming; Norman, Oklahoma, et al. filed.
Jun 23 2008	Brief amici curiae of Jewish Social Policy Action Network, et al. filed.
Jun 23 2008	Brief amici curiae of Foundation for Moral Law, et al. filed.
Jun 23 2008	Brief amici curiae of American Jewish Committee, et al. filed.
Jun 23 2008	Brief amici curiae of Faith and Action and Basic Life Principles filed.
Jun 23 2008	Brief amicus curiae of James Madison Center for Free Speech filed.
Jun 23 2008	Brief amicus curiae of Boy Scouts of America filed.
Jun 23 2008	Brief amici curiae of Becket Fund for Religious Liberty, et al. filed.
Jun 23 2008	Brief amici curiae of American Legion, et al. filed.
Jun 23 2008	Brief amicus curiae of Liberty Counsel filed.
Jun 23 2008	Brief amicus curiae of American Catholic Lawyers Association filed.
Jun 23 2008	Brief amicus curiae of National Legal Foundation filed.
Jun 30 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 31 2008	CIRCULATED
Jul 31 2008	Brief amicus curiae of Rutherford Institute filed. (Distributed)
Aug 12 2008	Record received from U.S.C.A. for the Tenth Circuit. (1 box)
Aug 15 2008	Brief of respondent Summum filed. (Distributed)
Aug 18 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 18 2008	SET FOR ARGUMENT ON Wednesday, November 12, 2008.
Aug 19 2008	Brief amicus curiae of American Jewish Congress filed. (Distributed)
Sep 15 2008	Reply of petitioners Pleasant Grove City, Utah, et al. filed. (Distributed)
Oct 6 2008	Record received from the U.S.D.C. for the Central District of Utah. (1 box) This record contains sealed documents.
Nov 12 2008	Argued. For petitioners: Jay A. Sekulow, Washington, D.C.; and Daryl Joseffer, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Pamela Harris, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

PLEASANT GROVE CITY, ET AL.,
Petitioners,

v.

SUMMUM, a corporate sole and church,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Pleasant Grove City owns and displays a number of monuments, memorials, and other objects in a municipal park. Respondent Summum sued in federal court, contending that because the city had accepted monuments donated by local civic groups, the First Amendment compels the city to accept and display Summum's "Seven Aphorisms" monument as well. The district court denied Summum's request for a preliminary injunction, but a panel of the Tenth Circuit reversed, holding that the city must immediately erect and display Summum's monument. The Tenth Circuit then denied the city's petition for rehearing en banc by an equally divided, 6-6 vote. The questions presented are:

1. Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor?
2. Did the Tenth Circuit err by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties?
3. Did the Tenth Circuit err by ruling that the city must immediately erect and display Summum's "Seven Aphorisms" monument in the city's park?

PARTIES

In addition to petitioner Pleasant Grove City, the following parties were defendants-appellees in the Tenth Circuit and are petitioners here:

Jim Danklef, Mayor

Mark Atwood, Cindy Boyd, Mike Daniels, Darold McDade, and Jeff Wilson, City Council Members

Carol Harmer and G. Keith Corry, former City Council Members

Frank Mills, City Administrator

Respondent Summum was the plaintiff-appellant in the Tenth Circuit.

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INTRODUCTION

The court below ruled that, once a city accepts and permanently displays a monument donated by a private party, the city creates a forum for permanent monuments and must then accept other monuments donated by private parties for permanent display. The decision below conflicts with decisions in the Second, Third, Sixth, Seventh, Eighth, and D.C. Circuits. Moreover, the Tenth Circuit's ruling creates enormous practical problems. Once a forum for **private** speech is opened, viewpoint discrimination is constitutionally impermissible, even in a nonpublic forum. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993). Effectively, a city cannot accept a monument posthumously honoring a war hero without also being prepared to accept a monument that lampoons that same hero. Nor may a city accept a display that positively portrays Native American culture unless it is prepared to accept another that disparages that culture.

In short, under the Tenth Circuit's ruling, every state or local government that displays a memorial originally donated by a private entity "must either remove the . . . memorials or brace themselves for an influx of clutter." App.10f (McConnell, J., dissenting from denial of rehearing en banc).

The analytical misstep in the decision below occurred at the starting gate. When private speakers have the right to use government property to speak, there is a speech forum. But when, as here, the donor cedes and the government accepts **ownership and control** of something from a private party, that

"something" is no longer private property. It becomes **government** property. And if it is a message-bearing "something," any communication thenceforth is **government speech**, not private speech. No "forum" for private speech is created.

Thus, when an artist donates a sculpture for the decoration of a municipal lobby or plaza, that sculpture becomes a **government** display, regardless of its private source. The government can thereafter move, discard, warehouse, or replace the sculpture. This is entirely different from, say, a temporary display of schoolchildren's posters in a government hallway, which may open a temporary forum for the children's private speech.

Likewise, when a city museum acquires a work of art, it is the city that speaks (the message being, this is a piece of art we find aesthetically attractive, historically significant, etc.); the creator of the work no longer controls the display. No forum has been created, and no competing artist can insist, with the force of a constitutional right, on "My turn!"

And when a municipality takes ownership and control of a monument and chooses to display it in a park, as here, it is now the municipality that speaks (the message being, we think this monument reflects our history, or sends a valuable message, or will attract tourists, etc.). The private donor can boast of its contribution, to be sure, but the donor is no longer the speaker. No other private donors can insist that the government accept their additional monuments so that they can be speakers, too. Or, as the D.C. Circuit put it, "If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee." *PETA*

v. *Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005).

Disposition of the present case is therefore straightforward: there is no forum for private speech in the government's choice of what monuments permanently to display, and the government is free to adopt the content or viewpoint it desires in selecting such monuments. Unlike in private speech cases, accepting a monument for permanent display as the government's own property does not require accepting other monuments in the name of content- or viewpoint-neutrality. Nor does the government's acceptance of a donated monument require that a government park be turned into a cluttered junkyard of monuments contributed by all comers.

In short, accepting a Statue of Liberty does not compel a government to accept a Statue of Tyranny.

This Court should grant review.

DECISIONS BELOW

All decisions in this case to date are entitled *Summum v. Pleasant Grove City*. The panel opinion of the Tenth Circuit appears at 483 F.3d 1044 (10th Cir. 2007). App. A. The opinions accompanying the denial of rehearing and rehearing en banc appear at 499 F.3d 1170 (10th Cir. 2007). App. F. The decision of the district court denying (*inter alia*) Summum's motion for a preliminary injunction is unreported. App. B.

JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit issued its panel decision on April 17, 2007, and denied a timely petition for rehearing en banc on August 24,

2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

The text of the First and Fourteenth Amendments to the U.S. Constitution are set forth in Appendix G. The current city policy governing the placement of monuments is set forth in Appendix H.

STATEMENT OF THE CASE

1. Jurisdiction in District Court

The complaint in this case invoked 42 U.S.C. § 1983, and the district court had jurisdiction under 28 U.S.C. § 1343. The complaint also raised pendent state claims, invoking jurisdiction under 28 U.S.C. § 1367. The pendent state claims are not before this Court in the current posture of the case.

2. Facts Material to Consideration of the Questions

a. Pioneer Park

Petitioner Pleasant Grove City is a municipality in Utah County, Utah. One of the municipal parks in Pleasant Grove is Pioneer Park. That park contains a variety of buildings, monuments, plaques, and memorials that either portray the Mormon pioneer-era heritage of Pleasant Grove, or are contributions of local civic groups, or both. The various objects in Pioneer Park include:

- Old Bell School (oldest known school building in Utah)
- First City Hall (original Pleasant Grove Town Hall)
- Pioneer Winter Corral (historic winter sheepfold)
- First Fire Station (facade of city's first fire station with plaque)
- Nauvoo Temple Stone (artifact from Mormon Temple in Nauvoo, Illinois)
- Pioneer Log Cabin (replica, built in 1930)
- Pioneer Water Well (donated by Lions Club in 1946)
- Pioneer Granary (built in 1874, donated by Nelson family)
- Ten Commandments Monument (donated by Fraternal Order of Eagles in 1971)
- September 11 Monument (project of local Boy Scouts)
- Pioneer Flour Mill Stone (used in first flour mill in town, donated by Joe Davis)

The city owns and controls all of the items permanently displayed in Pioneer Park. It is undisputed that the city, through its city council, has the power to determine which monuments, plaques, or memorials will be permanently displayed on city park property. Respondent Summum does not assert that any private party has the authority to erect permanent displays on city property.

b. Summum's Proposed Monument

Respondent Summum is a self-described "corporate sole and a church," founded in 1975, with its headquarters in Salt Lake City, Utah. In 2003, and

again in 2005, Summum, through its president Summum Ra, wrote to respondent Jim Danklef, mayor of Pleasant Grove, requesting permission to erect a monument in Pioneer Park. The Summum monument would contain the "Seven Aphorisms of Summum." Summum specifically requested that its Seven Aphorisms monument be "placed near the Ten Commandments monument . . . under the same conditions, rules, etc. under which the Eagles' [Ten Commandments] monument was and is permitted" in the park. Ex. A. to Cplt.

The city denied these requests. In a letter dated November 19, 2003, the Mayor explained that the objects on display in Pioneer Park either "directly relate to the history of Pleasant Grove" or "were donated by groups with long-standing ties to the Pleasant Grove community" which "have made valuable civic contributions to our city for many years." The Mayor explained to Summum that "your group does not meet either of our criteria." Ex. 1 to Deft. Pleasant Grove City's Answer to Cplt.

In 2004, Pleasant Grove adopted, by resolution, a policy governing (*inter alia*) placement of permanent displays in city parks. App. H. This policy set forth both the process and the criteria for such placements. The written criteria reiterated the factors of historical relevance or donation by a civic group with strong community ties. The policy also directed the city council to consider such factors as aesthetics, clutter, and safety. The council was authorized to make the final determination on such placements.

Summum does not contend that it meets either criterion for placement of its monument, i.e., historical relevance or established community ties.

3. Course of Proceedings

a. District Court

Respondent Summum filed suit in the U.S. District Court for the District of Utah on July 29, 2005, against petitioners Pleasant Grove City and its mayor, city administrator, current city council members, and two former city council members. Summum alleged that the city's denial of Summum's request to erect its Seven Aphorisms monument in Pioneer Park violated the "free expression provision" of the First Amendment. Cplt. at 8. Summum did **not** make any claim under the Free Exercise or Establishment Clauses of the First Amendment. Summum sought damages (voluntarily capped at $20), declaratory relief, and an injunction ordering that the city "immediately allow plaintiff SUMMUM to erect its monument." *Id.* at 11-12.

Summum focused its complaint upon the fact that the city had accepted for permanent display a Ten Commandments monument donated by the Fraternal Order of Eagles (Eagles). Under binding Tenth Circuit precedent, a municipality's display of such a donated monument remains, despite municipal ownership and control, the private speech of the donor (here, the Eagles), thereby creating a speech forum. *See Summum v. City of Ogden*, 297 F.3d 995, 1003-06 (10th Cir. 2002). This precedent, which conflicts with the law in other circuits, *infra* § I, enabled Summum to assert a species of an "equal access" free speech claim. *See* Cplt. at 8, ¶ 28 ("refusal to provide SUMMUM access to a forum similar to that provided to the Eagles violates the free expression provision of the first

amendment").

After the city and the mayor filed answers, Summum filed three motions, seeking (1) partial summary judgment, (2) temporary injunctive relief (*viz.*, a temporary restraining order and a preliminary injunction allowing Summum to "immediately erect a monument comparable to the Ten Commandments monument in the relevant city parks"), and (3) judgment on the pleadings (as to certain affirmative defenses).

The city opposed the motions and filed declarations from respondent Frank Mills, city administrator, and Terry Carlson, former head of the local Eagles branch. Summum subsequently filed the deposition transcripts of respondents Mills and Mayor James Danklef.

Relying exclusively upon the free speech guarantee of the federal First Amendment, Summum contended that the city "has created a public forum for the display of permanent monuments." Reply in Support of TRO & Prel. Inj. (Doc. 20) at 3; *see also* Mem. in Support of Partial Sum. Judg. & Prel. Inj. (Doc. 12) at 3-4.

In response, the city argued that even under binding Tenth Circuit precedent, the relevant "forum" was at most "a nonpublic forum." Deft. Resp. to Mot. for TRO & Prel. Inj. (Doc. 16) at 6, 7. In such a nonpublic forum, the city contended, it was legitimate for the city to refuse permanently to erect unsolicited monuments that lacked both historical relevance to the community and a connection to an established local civic group. *Id.* at 6-8.

The district court held a hearing on February 1, 2006. At that hearing the court orally denied Summum's motions for partial summary judgment and for interim injunctive relief. App. B. The court held

that there was at least a genuine issue of material fact as to the city's implementation of a "historical relevance" criterion for monument placement, thus precluding summary judgment. App. 2b-3b. Therefore, the court further ruled, Summum had not established a likelihood of success on the merits, and it would be "premature" to order the city to allow the erection of Summum's Seven Aphorisms monument. App. 3b-4b.

The court subsequently issued a written order granting in part and denying in part Summum's motion for judgment on the pleadings regarding certain affirmative defenses. App. D.

On February 22, 2006, Summum filed a notice of appeal from the denial of its motion for a preliminary injunction.

b. Tenth Circuit Panel

On appeal, Summum again relied exclusively upon the Free Speech Clause of the First Amendment. Aplt. Br. at 17-25. Summum argued that Pioneer Park is a "public forum for the display of permanent monuments," *id.* at 18, either because the park, as a public park, is a traditional public forum, *id.* at 18-19, or because by accepting and displaying a September 11 monument and the Eagles' Ten Commandments monument, the city had created a "designated public forum," *id.* at 19-21. Summum contended, *id.* at 34, that the case was controlled by circuit precedent, specifically *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002).

The city, acknowledging Tenth Circuit precedent binding on the panel, Aplee Br. at 14, argued that the "forum" at issue was at most "nonpublic," *id.* at 16. The

city went on to note, however, that the city's display of monuments was more properly characterized as **government** speech, not **private** speech, and that consequently **no "forum"** for such expressive monuments existed in the first place. *Id.* at 16 n.3. In any event, the city argued, the city's policy of accepting only monuments either with historical relevance to the community or when donated by groups with strong local ties passed constitutional muster. The city added that Summum's legal theory would convert Pioneer Park into a "veritable dumping ground" for monuments. *Id.* at 26.

In a decision issued on April 17, 2007, a panel of the Tenth Circuit reversed and remanded with instructions to grant a preliminary injunction allowing Summum to erect its Seven Aphorisms monument in Pioneer Park. App. A.

The panel held that because the injunction Summum requested would alter the status quo and would be mandatory, App. 6a, Summum was required to make "a strong showing" as to its likelihood of success on the merits, App. 7a (internal quotation marks and citation omitted). The panel concluded that Summum had made such a strong showing.[1]

The panel observed that "we have previously characterized a Ten Commandments monument

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[1]Because Summum was appealing the denial of a preliminary injunction, the Tenth Circuit also addressed the other equitable factors governing such relief. A proper showing on those factors, while necessary to Summum's appeal, is not sufficient for Summum to obtain such relief. If this Court agrees that Summum has not shown a likelihood of success on the merits, Summum's appeal would fail without any need to address the remaining factors, namely, the balance of equities and the public interest.

donated by the Fraternal Order of Eagles and placed by the city on public property as the private speech of the Eagles rather than that of the city." App. 3a n.2. Hence, the panel treated this as a case about private speech in a forum, not government speech. *Id.*

The panel ruled that "the nature of the forum in this case is public," App. 11a, because a "city park" is "a traditional public forum," App. 10a. Therefore, the panel reasoned, "the city's restrictions on speech are subject to strict scrutiny." *Id.* Holding that the city's "historical relevance" criterion for determining which monuments or memorials to install was "content based," App. 14a, the panel concluded that the city's refusal to erect Summum's Seven Aphorisms monument likely failed strict scrutiny both for want of a compelling interest, App. 15a, and for want of narrow tailoring, App. 16a.[2]

c. Tenth Circuit En Banc Petition and Denial

The city petitioned for rehearing en banc. Noting that the Tenth Circuit panel had been obligated to follow previous circuit precedent[3] (specifically, the

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[2]The panel noted that the city still had the option to "ban all permanent displays of an expressive nature by private individuals." App.18a. But under Tenth Circuit precedent, any donated monuments can be deemed speech by private individuals. *See* App. 3a n.2; *Ogden*, 297 F.3d at 1003-06. Hence, this "option" is tantamount to saying a city must either refuse and remove all donated monuments from city parks, or else accept and display monuments from all comers.

[3]"We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)

Ogden decision) holding that a monument donated to a city remains the private speech of the donor, not the speech of the city, the city in this case urged the Tenth Circuit to grant en banc review and overrule *Ogden*. The city contended that, because it owned and controlled the monuments erected in its park, the display of such monuments was **government** speech that created no forum for **private** speech. Moreover, the city pointed out that the panel decision would have all manner of untoward consequences, by establishing an "equal access" rule for permanent monuments.

On August 24, 2007, the Tenth Circuit denied en banc rehearing by an equally divided 6-6 vote.[4] App. F.[5] Two judges wrote dissenting opinions, while the author of the original panel decision wrote a response to the dissents.

Judge McConnell, joined by Judge Gorsuch, faulted the panel's legal reasoning and lamented the harmful consequences of the panel decision for government-run parks:

> [The panel] hold[s] that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection

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(per curiam) (and cases cited). *Accord United States v. Austin*, 426 F.3d 1266, 1278 n.4 (10th Cir. 2005) (and cases cited).

[4]Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch, and Holmes voted for rehearing en banc. Chief Judge Tacha and Judges Kelly, Henry, Briscoe, Murphy, and Hartz voted to deny en banc review.

[5]The denial of rehearing in this case was consolidated with the denial of rehearing in a similar case, *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007).

> of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, they must allow everyone else to do the same, with no discretion as to content -- unless their reasons for refusal rise to the level of "compelling" interests. . . . This means that Central Park in New York, which contains the privately donated Alice in Wonderland statu[]e, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

App. 10f.

> A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument -- or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.

App. 11f.

Judge McConnell explained that the traditional public forum status of a park does **not** mean that "city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties." App. 11f. Noting that the city did not "invite private citizens to erect monuments of their own choosing in these parks," Judge McConnell reasoned that "[i]t follows that any messages conveyed

by the monuments they have chosen to display are 'government speech,' and there is no 'public forum' for uninhibited private expression." App. 11f-12f. Indeed, because the city "owned" and "exercised total 'control' over the monuments," Judge McConnell explained, the city "could have removed them, destroyed them, modified them, remade them, or . . . sold them at any time." App. 14f.

"Once we recognize that the monuments constitute government speech," Judge McConnell continued, "it becomes clear that the panel's forum analysis is misguided." App.15f. "The government may adopt whatever message it chooses -- subject, of course, to other constitutional constraints, such as . . . the Establishment Clause," Judge McConnell observed. *Id.* "[J]ust because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing." App. 16f.

Judge McConnell concluded that the panel decision is "incorrect as a matter of doctrine and troublesome as a matter of practice." App. 17f. "[T]he error in this case is sufficiently fundamental and the consequences sufficiently disruptive that the panel decision[] should be corrected." *Id.*

Judge Lucero, in a separate dissent, explained that a park, while a traditional public forum for many purposes, is **not** a public forum for the placement of monuments. App. 5f-7f. Judge Lucero protested that the original panel "has given an unnatural reading to the traditional public forum doctrine [which] binds the hands of local governments as they shape the permanent character of their public spaces." App. 9f. He concluded:

> The panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them. Because I believe the panel's legal conclusions are incorrect, and that its decisions will impose unreasonable burdens on local governments in this circuit, I would grant rehearing en banc.

Id.

Chief Judge Tacha, author of the original panel decision, took the "unprecedented step of responding to the dissents" in her own separate opinion. App. 18f. She rejected the significance of any distinction between "transitory and permanent expression" (e.g., leaflets vs. monuments) "for purposes of forum analysis," *id.*; nor, for her, did the "type of speech" (e.g., leaflets vs. monuments) matter, App. 18f-19f. Indeed, Chief Judge Tacha insisted, "the only question properly before the panel" was whether the city "could constitutionally **discriminate**" against other private speakers. App. 19f n.1 (emphasis in original). She specifically rejected the contention that this was a "government speech" case: "the appropriate inquiry is whether the government controls the content of the speech at issue, that is whether the message is a government-crafted message." App. 22f. Here, because the city had not itself prescribed the messages on the Ten Commandments monument, the city's selection, ownership, and control of this and other monuments did not suffice, in her view, to make the city the speaker in the selection and placement of permanent monuments. App. 20f-22f. Finally, Chief Judge Tacha voiced concern at the prospect that a government could adopt a message on a monument without any political

accountability. App. 23f, 25f-27f. She did not explain, however, why the city council in this case (or any other case) would not be as politically accountable for its votes on monument placement as it would be for any other votes.

d. Tenth Circuit Mandate Stayed

On August 29, 2007, the city moved to stay the Tenth Circuit's mandate pending a petition for a writ of certiorari. On September 5, 2007, the Tenth Circuit panel stayed its mandate. App. E. (Proceedings in the district court have also been stayed. *See* Order of May 2, 2007 (Doc. 257).)

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision in this case conflicts with the decisions of other circuits, badly distorts this Court's First Amendment jurisprudence, and will impose severe practical burdens on government entities until overturned by this Court.

The decision below creates two circuit splits on important First Amendment free speech issues. *Infra* § I. First, the Tenth Circuit held that a donated monument which is owned, controlled, and displayed by a municipality remains the **private** speech of the original donor, not **government** speech (as other circuits hold). Second, the Tenth Circuit held that the placement of donated monuments in a government-owned park creates a **"public forum" for monuments,** while other circuits hold instead that the government retains authority to select which structures, if any, to display.

The decision below also terribly confuses this Court's public forum and government speech doctrines. *Infra* § II. Nowhere has this Court suggested that private entities have a First Amendment right to insist that a government erect and display the permanent monument which that private group chooses. To the contrary, this Court's precedents point strongly in the opposite direction.

Finally, the decision below threatens to wreak havoc upon governments at every level and their ability to control the permanent physical occupation of government land. *Infra* § III. Given the ubiquity of governmental bodies displaying donated monuments on public property, *see e.g.*, App. I -- from the Statue of Liberty on down -- a host of federal, state, and local government bodies are now sitting targets for demands that they grant "equal access" to whatever comparable monuments a given group wishes to have installed, be it Summum's Seven Aphorisms, an atheist group's Monument to Freethought, or Rev. Fred Phelps's denunciations of homosexual persons.

This Court should grant review and reverse the Tenth Circuit's decision.[6]

I. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, SIXTH, SEVENTH, EIGHTH, AND D.C. CIRCUITS.

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[6]That the current appeal is at the preliminary injunction stage, of course, poses no obstacle to review on certiorari. *E.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 856-57 (2005); *Gonzales v. Raich*, 545 U.S. 1, 8 (2005).

A. The Tenth Circuit's Holding, that Monuments in City Parks Are Not Government Speech But Instead Are the Private Speech of the Original Donors of the Monuments, Conflicts with Decisions of the Second, Third, Seventh, Eighth, and D.C. Circuits.

This Court's jurisprudence recognizes a crucial distinction between **government** speech and **private** speech for First Amendment purposes. *See, e.g., Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 559 (2005) (compelled speech); *Board of Educ. v. Mergens,* 496 U.S. 226, 250 (1990) (plurality) (Establishment Clause); *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 765-66 (1995) (plurality) (same). In particular, when the government restricts **private** speech, an array of constitutional free speech protections come into play. By contrast, when the **government** speaks, it generally can select the precise message or messages it wishes to deliver. *See generally Rust v. Sullivan,* 500 U.S. 173, 194 (1991); *Rosenberger v. Rector of Univ. of Va.,* 515 U.S. 819, 833 (1995); *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 541-42 (2000).

The decision below reflects the rule in the Tenth Circuit that, when a city accepts and erects for permanent display a monument donated by a private entity, that monument remains the **donor's** private speech despite the government's ownership and control of the monument. *See* App. 3a n.2; *Summum v. City of Ogden,* 297 F.3d 995, 1003-06 (10th Cir. 2002); *Summum v. Callaghan,* 130 F.3d 906, 919 & n.19 (10th Cir. 1997); *Summum v. Duchesne City,* 482 F.3d 1263,

1269, 1273-74 (10th Cir. 2007). As a consequence, in the Tenth Circuit, a city's decision **not** to erect a private entity's proposed monument triggers First Amendment scrutiny. App. 10a.

The Second, Third, Seventh, Eighth, and D.C. Circuits, by contrast, recognize that government-owned and government-controlled displays are **government** speech, not private speech.

In *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005), the District of Columbia's Commission on the Arts and the Humanities administered an art project entitled "Party Animals," in which private artists were invited to submit designs for painting and decorating sculptures of donkeys and elephants for display in parks, on sidewalks, and in other prominent locations in Washington, D.C. *Id.* at 25. The District's Commission retained ownership of the sculptures, *id.*, and selected which proposed designs would be used, *id.* at 25-26. The group People for the Ethical Treatment of Animals (PETA) submitted several proposed designs, which contained messages condemning animal cruelty. *Id.* at 26. When the Commission refused PETA's proposals, PETA sued, alleging content- and viewpoint-discrimination in violation of the First Amendment. The D.C. Circuit rejected PETA's claim, holding that the selection of the sculptures in question was **government speech**:

> In the case before us, **the Commission spoke** when it determined which elephant and donkey models to include in the exhibition and which not to include. In using its editorial discretion in the selection and presentation of the elephants and donkeys, the Commission thus engaged in speech activity; compilation of the speech of third parties

> is a communicative act. . . .
>
> . . . .
>
> . . . We believe that public forum principles are out of place in the context of this case. . . . [T]hose First Amendment constraints do not apply when the same authorities engage in **government speech by installing sculptures in the park. If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee.**

Id. at 28-29 (emphasis added; internal quotation marks and citations omitted).

In *ACLU v. Schundler*, 104 F.3d 1435 (3d Cir.), *cert. denied*, 520 U.S. 1265 (1997), the Third Circuit reviewed the constitutionality of a Christmas crèche display. The court recognized that, in the *Capitol Square* case, the Justices of this Court had divided on the question whether the "endorsement test" under the Establishment Clause properly applies to **private** speech. *See ACLU v. Schundler*, 104 F.3d at 1443-44. Importantly, the Third Circuit then held:

> We need not reach the question . . . whether the endorsement test should be limited in application to **government speech,** because the religious symbols at issue here are **owned and displayed by the city government on city government property.**

Id. at 1444 (emphasis added). In other words, the Third Circuit squarely held that objects "owned and displayed" by the government on government property are "government speech." *Id.*

In *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988), a sculptor contested the

decision of the federal General Services Administration (GSA) to remove his sculpture from a government plaza. The sculptor, Richard Serra, asserted a violation of his free speech rights under the First Amendment, but the Second Circuit disagreed:

> In this case, **the speaker is the United States Government. [The sculpture] is entirely owned by the Government and is displayed on Government property.** Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA . . . . Nothing GSA has done limits the right of any private citizen to say what he pleases, nor has Serra been prevented from making any sculpture or displaying those that he has not sold. Rather, the Government's action in this case is limited to an exercise of discretion with respect to the display of its own property. . . . [N]othing GSA has done here encroaches in any way on Serra's or any other individual's right to communicate.

Id. at 1049 (emphasis added).

Decisions in the Seventh and Eighth Circuits likewise acknowledge that, in cases involving expressive displays, the identity of the speaker is coincident with the party currently owning and controlling the display, not the creator or previous owner. *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 774, 778 (8th Cir. 2005) (en banc) (analyzing "Plattsmouth's display" of donated Eagles Ten Commandments monument in city park with respect to "limits to government displays"); *Freedom From Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000) (Establishment Clause challenge to donated statue of Jesus Christ: in light of the

"difference in the way we treat private speech and public speech" being "critical" to constitutional analysis, "we recognize the effect of formal transfer of legal title to property as a transfer of imputed expression").

The Tenth Circuit's decision in this case thus squarely conflicts with the decisions of at least five other circuits on the foundational First Amendment issue of government speech, necessitating review by this Court.

B. The Tenth Circuit's Holding that a City Park Is a "Public Forum" for Monuments Conflicts with Decisions in the Second, Sixth, and Seventh Circuits.

This Court's Free Speech Clause jurisprudence subjects restrictions on private speech to differing levels of scrutiny depending on the nature of the "speech forum" involved. In particular, this Court distinguishes between "public fora" (whether "traditional" in nature, like sidewalks and parks, or instead "designated" by the government's opening a venue for private speech), where content-based limitations trigger strict scrutiny, and "nonpublic fora," where restrictions can be content-based so long as they are reasonable and viewpoint-neutral. *See generally Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).

The Tenth Circuit held that "[t]he permanent monuments in the city park . . . make up the relevant forum," App. 9a, and that "the nature of the forum in this case is public," App. 11a, because a "city park" is

"a traditional public forum," App. 10a. Hence, in the Tenth Circuit, private parties have a free speech right to erect **monuments**; a city's refusal of any request to erect a privately proffered monument triggers "strict scrutiny," *id.*, unless the city bans "all permanent displays" of nongovernmental provenance, App.18a.

Every other circuit to address the issue, by contrast, rejects the notion that there is a First Amendment right to erect monuments or similar displays in government parks, sidewalks, or other property. *See, e.g., Kaplan v. City of Burlington,* 891 F.2d 1024, 1029 (2d Cir. 1989) (rejecting suit to compel display of menorah in park: though city's park "is indisputably a traditional public forum," city "had not created a forum . . . open to [an] unattended, solitary display" where "no permit had been issued" for any private party to erect an "unattended display"); *Lubavitch Chabad House v. City of Chicago,* 917 F.2d 341, 347 (7th Cir. 1990) (rejecting suit to compel display of menorah in airport: "We are not cognizant of . . . any private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures");[7] *Graff v. City of Chicago,* 9 F.3d 1309, 1314 (7th Cir. 1993) (en banc) (no right to erect permanent newsstand on sidewalk: "[t]here is no private constitutional right to erect a

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[7]The *Lubavitch* court acknowledged that a different result could follow if the government "opens a public forum to allow some groups to erect communicative structures," 417 F.3d at 347. In the present case, however, it is undisputed that the city, through its council, retains exclusive authority to decide what structures to erect and display. *See* Plff's Stmt. of Undisputed Facts (Doc. 11) at 3, ¶ 6. No private party has the authority to erect a display.

permanent structure on public property"); *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) (discussing governing law in addressing display of large inflatable display by union: "Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved").

The Tenth Circuit's decision in this case thus conflicts with decisions in at least three other circuits on yet another important First Amendment issue, necessitating this Court's review.

II. THE DECISION OF THE TENTH CIRCUIT DISTORTS THIS COURT'S FREE-SPEECH JURISPRUDENCE.

The Tenth Circuit's decision in this case rests upon premises that this Court has squarely rejected.

A. Nature of Forum

This Court has repeatedly explained that the relevant forum in a free speech case must be identified according to the nature of "the access sought by the speaker," not "merely by identifying the government property at issue." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). The Tenth Circuit nevertheless held that, just because the city's monuments were in a public park, traditional public forum analysis applies. App. 10a. *See also Summum v. Duchesne City*, 482 F.3d at 1269 ("it is this **physical setting** that defines the character of the forum to which Summum seeks access") (emphasis added). That

rationale is wholly incompatible with this Court's precedents.

A structure does not become a public forum just because it is situated on public forum property. In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the speakers posted fliers on the "horizontal crosswires supporting utility poles" along public streets and sidewalks. *Id.* at 802. This Court held that the speakers' "reliance on the public forum doctrine is misplaced." *Id.* at 814. Rather than ignore the difference between **distributing** fliers and **posting** fliers, this Court explained that the challengers "fail[ed] to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks." *Id.* Notably, this Court held that "the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." *Id.* (internal quotation marks and citation omitted).

In short, just because certain property is a public forum for some kinds of communication (leafletting, speaking) does not mean it is a public forum for other kinds of communication (posting fliers, littering leaflets, erecting monuments). *See id.* at 809-10; *Schneider v. State*, 308 U.S. 147, 160-61 (1939). *See also Capitol Square*, 515 U.S at 761 (suggesting "a ban on all unattended [private] displays" as a permissible restriction even in a traditional public forum); *id.* at 802-04 (Stevens, J., dissenting) (agreeing that "a State may impose a ban on all private unattended displays" in a public forum: "The Court has never held that a private party has a right to have an unattended object

in a public forum," as such placements "create[] a far greater intrusion on government property [compared with speaking, handbilling,etc.] and interfere[] with the government's ability to differentiate its own message").

Thus, under this Court's case law, the forum -- if any -- in this case would not be the park itself, but rather the management and selection of permanent displays in city parks. Private parties have **no** access to such management and selection -- all private parties can do is make offers of donations or volunteer their opinions -- hence, there is **no** speech forum here at all (and certainly no "public forum").

B. Identity of Speaker

The Tenth Circuit held that a monument donated to and then accepted and controlled by a city somehow remains the speech of the private donor, not the city. Such a notion is inconsistent with this Court's precedents.

Time and again this Court has held that when the government is speaking, the government is entitled to define and control the message; there is no obligation of content- or viewpoint-neutrality. *See supra* § I(A). Moreover, the **selection** of material for governmental display is itself the exercise of governmental authority, not private expression. *See United States v. American Library Ass'n*, 539 U.S. 194, 208 (2003) (plurality) (noting library's "traditional role in identifying suitable and worthwhile material"); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998) (noting government agency's role in selecting certain expressive works); *cf. Board of Educ. v. Pico*, 457 U.S.

853, 871 (1982) (plurality) ("[N]othing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools") (emphasis omitted); *id.* at 889 (Burger, C.J., joined by Powell, Rehnquist, & O'Connor, JJ., dissenting) (schools "ought not to be made the slavish courier of the material of third parties").

It follows that a city's selection of which items to display in a park -- like its selection of decorations for government buildings -- is government speech, and no private entity can claim a "me too!" right of access for its own preferred displays.

III. THE TENTH CIRCUIT'S DECISION CREATES ENORMOUS PRACTICAL PROBLEMS.

The Tenth Circuit's decision creates a right of "equal access" for the erection of permanent monuments. Every federal, state, or local governmental body in the Tenth Circuit's jurisdiction is now open to lawsuits insisting upon the permanent display of a private entity's preferred monument alongside any other monument that was originally donated by a private entity. This is a matter of considerable concern: donated monuments are ubiquitous on governmental property. *See* App. I (listing examples of donated monuments in parks and other government-owned properties within the Tenth Circuit).

The string of *Summum* cases themselves, *see supra* pp. 18-19, illustrates that the threat of equal-access-for-private-monuments litigation is very real. Nor is this phenomenon exclusive to Summum. Already the

notorious Rev. Fred Phelps has sought the erection of anti-homosexual monuments under the same theory. *See* Associated Press, *Minister: City must allow anti-gay monument in park* (Oct. 16, 2003) (www.firstamendmentcenter.org/news.aspx?id=12082) (Phelps pressed Casper, Wyoming to accept and display anti-Matthew Shepard monument, relying upon Tenth Circuit's *Summum* decisions); John Morgan, *City dedicates historic plaza*, Jackson Hole Star Tribune (July 16, 2007) (www.jacksonholestartrib.com/articles/2007/07/16/news/casper4e32f677cbf04e3587253190020f943.txt) (noting Ten Commandments monument in Casper was removed in November 2003 after Phelps's demand but has returned as part of a "new historic monument plaza"); John Morgan, *Phelps wants anti-gay monument*, Casper Star Tribune (July 17, 2007) (www.casperstartribune.net/articles/2007/07/17news/casper/88d8fdf4b4e017548725731b00006a13.txt) (Phelps has renewed his push for anti-Shepard monument) (The proposed Casper monument appears at www.godhatesfags.com/main/shepard_monument.html.)

The theory the Tenth Circuit endorsed in this case is also being pressed within the Eighth and Ninth Circuits. *See* Judy Keen, *Fight over Thou Shalts won't wilt*, USA Today (Sept. 7, 2007) (www.usatoday.com/printedition/news/20070709/a_commandments09.art.htm) (Red River Freethinkers in Fargo, North Dakota, want their own monument to "balance the Ten Commandments"). *See also* Associated Press, *Boise: No anti-gay monument*, Spokesman-Review (Dec. 9, 2003) (www.spokesmanreview.com/pf.asp?date=20903&ID=s1452867) (Phelps proposal of anti-Shepard monument in Boise).

As the dissenters lamented below, the "panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them." App. 9f (Lucero, J., dissenting). *Accord* App. 10f (McConnell, J., dissenting) ("Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter").

CONCLUSION

This Court should grant review.

Respectfully submitted,

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November 20, 2007

APPENDIX

APPENDIX A

No. 06-4057

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church, Plaintiff-Appellant,

PLEASANT GROVE CITY, a municipal corporation; JIM DANKLEF, Mayor; MARK ATWOOD, City Council Member; CINDY BOYD, City Council Member; MIKE DANIELS, City Council Member; DAROLD MCDADE, City Council Member; JEFF WILSON, City Council Member; CAROL HARMER, former City Council Member; G. KEITH CORRY, former City Council Member; FRANK MILLS, City Administrator, Defendants-Appellees.

April 17, 2007, Filed

Before TACHA, Chief Circuit Judge, EBEL, Circuit Judge, and KANE,* District Judge.

* Honorable John L. Kane, Jr., Senior District Judge for the District of Colorado, sitting by designation.

TACHA, Chief Circuit Judge.

The Plaintiff-Appellant Summum, a religious organization, filed suit under 42 U.S.C. § 1983 for violation of its First Amendment rights against the Defendants-Appellees, the City of Pleasant Grove, its

mayor, city administrator, and city council members. Summum appeals the District Court's denial of its request for a preliminary injunction. We exercise jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) and reverse the District Court's decision.

BACKGROUND

A city park in Pleasant Grove, Utah, contains a number of buildings, artifacts, and permanent displays, many of which relate to or commemorate Pleasant Grove's pioneer history. For example, the park contains one of Pleasant Grove's first granaries, its first city hall, and its first fire department building. For purposes of this appeal, the most important structure is a Ten Commandments monument, donated by the Fraternal Order of Eagles in 1971, two years after it established a local chapter in Pleasant Grove.

In September 2003, Summum, a religious organization with headquarters in Salt Lake City, Utah, sent the mayor of Pleasant Grove a letter requesting permission to erect a monument containing the Seven Aphorisms of Summum in the city park. In its letter, Summum stated that its monument would be similar in size and nature to the Ten Commandments monument already present in the park. Approximately two months after Summum made its request, the mayor sent Summum written notification that the city had denied its request because the proposed monument did not meet the city's criteria for permanent displays in the park. According to the letter, all permanent displays in this particular park must "directly relate to the history of Pleasant Grove"

or be "donated by groups with long-standing ties to the Pleasant Grove community."[1] The following year, in August 2004, the city passed a resolution codifying and expanding upon its alleged policy for evaluating requests for permanent displays in the park. The resolution contains a number of factors the city council must consider in deciding whether a proposed display meets a historical relevance requirement. In May 2005, Summum renewed its request, sending the mayor another letter with substantially the same language as the first letter.

When the city did not respond to its second request, Summum filed suit in federal district court seeking declaratory and injunctive relief, as well as monetary damages, for Pleasant Grove's violation of Summum's free speech rights under the U.S. Constitution and for the city's violation of the Utah Constitution's free expression and establishment provisions. Summum contends that the city violated its rights by excluding its monument while allowing other permanent monuments of an expressive nature (e.g., the Ten Commandments) to be displayed in the park.[2]

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[1]Although Summum claims it did not receive this letter, the organization's president acknowledged that he had read the notice of the city's denial in the newspaper. (Applt. App. at 59)

[2]The Ten Commandments monument clearly constitutes protected speech. *Summum v. Callaghan*, 130 F.3d 906, 913-14 (10th Cir. 1997) ("[P]rivate religious speech . . . is as fully protected under the Free Speech Clause as secular private expression." (quotations omitted)). In addition, we have previously characterized a Ten Commandments monument donated by the Fraternal Order of Eagles and placed by the city on public property as the private speech of the Eagles rather than that of the city. *See Summum v. City of Ogden*, 297 F.3d 995, 1006 (10th

In an oral ruling on various motions, the District Court denied Summum's request for a preliminary injunction requiring the city to permit the display of Summum's monument in the park. Summum subsequently appealed this decision, arguing that the District Court abused its discretion in denying the injunction based on Summum's First Amendment claim.[3]

DISCUSSION

I. Preliminary Injunction Standard

We review a district court's decision to deny a motion for a preliminary injunction for abuse of discretion, which we have characterized as "an

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Cir. 2002); *Callaghan*, 130 F.3d at 913. Pleasant Grove argues that the Supreme Court's recent decision in *Van Orden v. Perry*, 545 U.S. 677 (2005), requires this Court to treat the Ten Commandments monument as governmental speech. In *Van Orden*, the Supreme Court held that the Establishment Clause was not violated by the display of a similar Ten Commandments monument on the Texas State Capitol grounds. Pleasant Grove contends that the Supreme Court would not have applied an Establishment Clause analysis in *Van Orden* unless the Court considered the Ten Commandments monument to be governmental speech. But this argument is without merit because the Establishment Clause prohibits governmental endorsement of religion, which can occur in the absence of direct governmental speech. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (O'Connor, J., concurring in part and concurring in judgment).

[3]Summum does not argue on appeal that it is entitled to a preliminary injunction based on its claims under the Utah Constitution and has therefore waived this issue. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994).

arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Schrier v. Univ. of Colorado*, 427 F.3d 1253, 1258 (10th Cir. 2005) (quotations omitted). "A district court abuses its discretion when it commits an error of law or makes clearly erroneous factual findings." *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252 (10th Cir. 2006). In reviewing the district court's decision, "[w]e examine the . . . court's underlying factual findings for clear error, and its legal determinations *de novo*." *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002).

To prevail on a motion for a preliminary injunction in the district court, a moving party must establish that:

> (1) [he or she] will suffer irreparable injury unless the injunction issues; (2) the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits.

Schrier, 427 F.3d at 1258 (quotations omitted) (alterations in original). But because a preliminary injunction is an extraordinary remedy and is intended "merely to preserve the relative positions of the parties until a trial on the merits can be held," we have held that the moving party must meet a heightened standard when requesting one of three types of historically disfavored injunctions. *Id.* at 1258-59 (quotations omitted).

The three types of disfavored injunctions are "(1) preliminary injunctions that alter the status quo; (2)

mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd and remanded*, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). When a preliminary injunction falls into one of these categories, it "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id.* A district court may not grant a preliminary injunction unless the moving party "make[s] a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Id.* at 976.

In this case, the preliminary injunction clearly falls within two categories of disfavored injunctions: it alters the status quo and is mandatory. An injunction alters the status quo when it changes the "last peaceable uncontested status existing between the parties before the dispute developed." *Schrier*, 427 F.3d at 1260 (quotations omitted). The last uncontested status between Summum and Pleasant Grove was one of no relationship between the two parties. Because Summum's monument is not currently displayed in a Pleasant Grove city park, an injunction ordering Pleasant Grove to permit the display of Summum's monument clearly changes the status quo. In addition, by requiring the city to make arrangements for the display of Summum's monument, an injunction would mandate that the city act and would require the district court to supervise the city's actions to ensure it abides by the injunction. Because an injunction

would "affirmatively require" Pleasant Grove "to act in a particular way" and would require ongoing court supervision, it is a mandatory injunction. *See id.* at 1261 (quotations and alterations omitted). Because the injunction falls into two disfavored categories, Summum must have made "a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms" to prevail on its motion at the district court level. *O Centro*, 389 F.3d at 976.

Based on the record, we cannot discern whether the District Court applied this heightened standard. In its oral ruling, the court simply noted that it denied Summum's motion because it failed to establish a substantial likelihood of success on the merits. The court did not analyze the other three factors or explicitly state that it applied a heightened standard to Summum's request. But even if the District Court concluded that Summum could not prevail using the lesser standard, it certainly would reach the same conclusion under the heightened standard. Although the "failure of the district court to apply the correct standard" to a request for a preliminary injunction "amounts to an abuse of discretion," *id.* at 982 n.5, any abuse in this case was in Summum's favor. We therefore assume that the District Court applied the heightened standard and review the court's legal conclusions and findings of fact for abuse of discretion.

II. Preliminary Injunction Analysis

In its oral ruling on Summum's motion for a preliminary injunction, the District Court indicated that Summum would not prevail on the merits if

Pleasant Grove proved it had a well-established policy for evaluating proposed monuments that was reasonable and viewpoint neutral. After finding that the facts regarding the city's policy (or lack thereof) were in dispute, the court concluded that Summum had not established a substantial likelihood of success on the merits. It therefore denied Summum's motion without addressing the other three factors required for issuance of a preliminary injunction.

As we explain below, the District Court abused its discretion by analyzing Summum's First Amendment claim under the incorrect legal standard. But rather than remanding to the District Court for the appropriate analysis, we find the record sufficiently developed to allow us to determine whether Summum has met its burden under the four factors necessary to prevail on its motion. *See Schrier*, 427 F.3d at 1261 (evaluating a request for an injunction on the merits when the district court applied the wrong legal standard); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1075-76 (10th Cir. 2001) (evaluating a request for an injunction on the merits when district court incorrectly applied legal test for restrictions on commercial speech).

A. Substantial Likelihood of Success on the Merits

1. Identifying the nature of the relevant forum

To determine the appropriate First Amendment standard under which to review the city's denial of Summum's request, the reviewing court must engage in a "forum analysis." The characterization of the forum at issue is crucial because "the extent to which

the Government can control access depends on the nature of the relevant forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). In identifying the relevant forum, the court looks at both "(1) the government property to which access is sought and (2) the type of access sought." *Summum v. City of Ogden*, 297 F.3d 995, 1001 (10th Cir. 2002). In this case, Summum seeks to display its monument among other monuments in Pleasant Grove's city park. The permanent monuments in the city park therefore make up the relevant forum. *See id.* at 1002 (identifying the relevant forum as "permanent monuments on the lawn of the . . . municipal building").

Having identified the relevant forum, the reviewing court must also determine whether the forum is public or nonpublic in nature. In general, the forum will fall into one of three categories:

> (1) a traditional public forum (e.g., parks and streets), (2) a designated public forum (i.e., the government voluntarily transforms a nonpublic forum into a traditional public forum, thereby bestowing all the free speech rights associated with the traditional public forum, albeit on a potentially temporary basis, onto that now 'designated public forum'), or (3) a nonpublic forum (i.e., the government retains the right to curtail speech so long as those curtailments are viewpoint neutral and reasonable for the maintenance of the forum's particular official uses).

Id. In the case before us, the District Court indicated that the applicable analysis is whether Pleasant

Grove's policy is reasonable and viewpoint neutral. The court therefore analyzed the city's actions using the standard associated with a nonpublic forum.

The city park is, however, a traditional public forum. Indeed, the Supreme Court has characterized streets and parks as "quintessential public forums," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), because people have traditionally gathered in these places to exchange ideas and engage in public debate:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

Id. (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939). Because the park is a public forum, the city's restrictions on speech are subject to strict scrutiny. *Id.*; *see also Cornelius*, 473 U.S. at 800 ("Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."); *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (indicating that such restrictions are subject to the "highest scrutiny").

Moreover, the city cannot close or otherwise limit

a traditional public forum by fiat; a traditional public forum is defined by its objective characteristics, not by governmental intent or action. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998); *see also First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002) ("The government cannot simply declare the First Amendment status of [a traditional public forum] regardless of its nature and its public use."). In short, the nature of the forum in this case is public. *See Eagon v. City of Elk City*, 72 F.3d 1480, 1486-87 (10th Cir. 1996) (rejecting argument that park is a nonpublic forum); *see also United States v.* Grace, 461 U.S. 171, 177 (1983) ("'[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'"); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (noting that *all* public streets are traditional public forums regardless of their particular character).

Pleasant Grove contends that our decisions in *City of Ogden* and *Summum v. Callaghan*, 30 F.3d 906 (10th Cir. 1997), support its argument that the monuments and other structures in the city park constitute a nonpublic forum. But in both *City of Ogden* and *Callaghan*, the property at issue could not be characterized -- by tradition or government designation -- as a public forum. *City of Ogden*, 297 F.3d at 1002 (holding that permanent monuments on the grounds of a municipal building were a nonpublic forum because property was "not by tradition or designation a forum for public communication" (quotations omitted)); *Callaghan*, 130 F.3d at 916-17 (holding that courthouse lawn was a nonpublic forum).

Conversely, in the present case, the property is a park, the kind of property which has "immemorially been held in trust for the use of the public." *Hague*, 307 U.S. at 515. In this way, the present case more closely resembles the facts in *Eagon*. In *Eagon*, individuals sued Elk City for violation of their free speech rights after the city excluded their display from "Christmas in the Park," an annual event during which individuals and groups were allowed to erect displays in Ackley Park. 72 F.3d at 1483. In conducting our forum analysis, we characterized the relevant forum as "Ackley Park during the 'Christmas in the Park' event" and held that the forum was a traditional public forum, in which "content-based restrictions on speech are valid only if necessary to serve a compelling state interest and if narrowly drawn to achieve that end." *Id.* at 1487. Similarly, the fact that Summum seeks access to a particular means of communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the *nature* of that forum. *See Cornelius*, 473 U.S. at 802 ("Having identified the forum . . . we must decide whether it is nonpublic or public in nature.").

By applying the standard associated with a nonpublic forum, the District Court committed an error of law. In a nonpublic forum, content-based restrictions on speech are permissible as long as they do not discriminate on the basis of the speaker's viewpoint and are reasonable. *Perry Educ. Ass'n*, 460 U.S. at 49; *see also Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint

neutral."). But in a public forum, content-based restrictions are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."). In order for a content-based restriction to survive strict scrutiny, the government must "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Educ. Ass'n, 460 U.S. at 45. As we explain below, Pleasant Grove has failed to justify its restriction on speech under this standard.[4]

2. Application of strict scrutiny to content-based restrictions in a traditional public forum

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[4]We note that the Supreme Court has chosen not to apply forum principles in certain contexts, recognizing that the government in particular roles has discretion to make content-based judgments in selecting what private speech to make available to the public. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs have broad discretion to consider content in making collection decisions); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585, (1998) (holding that the NEA may make content-based judgments in awarding grants as such judgments "are a consequence of the nature of arts funding"). The city in the case before us is not, however, acting in its capacity as librarian, television broadcaster, or arts patron. Because the Supreme Court has not extended the reasoning of these cases to the context we consider today, we conclude that the case is best resolved through the application of established forum principles.

Pleasant Grove concedes that its restriction on speech in the park is content based.[5] By requiring that monuments meet the city's historical relevance criteria, the city excludes monuments on the basis of subject matter and the speaker's identity.[6] Because the city's restrictions are content based, they may not be analyzed under the less exacting intermediate scrutiny applied to content-neutral restrictions regulating the time, place, or manner of expression in public forums. *Id.*

We must therefore determine whether Pleasant Grove has demonstrated that application of its historical relevance criteria will, "more likely than not, be justified by the asserted compelling interests." *Gonzales*, 126 S. Ct. at 1219; *see also Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665 (2004). ("When

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[5]In its brief, Pleasant Grove acknowledged that it evaluates proposed monuments based on their content: "[T]he City merely restricts permanent monuments based on either the content of the monument (i.e., the historical relevance to the City) or the identity of the donor (i.e., one with ties to the community). Such criteria, while certainly content-based, are reasonable and completely neutral with regard to viewpoint . . . ." App. Br. at 23.

[6]In addition to exclusions based on viewpoint or subject matter, exclusions based on the speaker's identity trigger strict scrutiny when the forum at issue is public. *See Cornelius*, 473 U.S. at 808 (noting that exclusion of speech from a public forum requires "a finding of strict incompatibility between the nature of the speech or the identity of the speaker" and the forum's function); *see also Mosley*, 408 U.S. at 96 ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression."); *Eagon*, 72 F.3d at 1487 (subjecting to strict scrutiny the city's denial to partisan groups of the same opportunity to speak as non-partisan groups in a traditional public forum).

plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute."); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005) ("A municipality has the burden of justifying its regulation [of speech] even on a motion to enjoin enforcement of an ordinance."). Even though the injunction in this case is disfavored and Summum's request is therefore analyzed under a heightened standard, in the context of a First Amendment challenge, Pleasant Grove bears the burden of establishing that its content-based restriction on speech will "more likely than not" survive strict scrutiny. *See Ashcroft*, 542 U.S. at 666 ("As the Government bears the burden of proof on the ultimate question of [the restriction's] constitutionality, [the moving party] must be deemed likely to prevail unless the Government has shown that [the moving party's] proposed less restrictive alternatives are less effective than [the restriction]."); *Leavitt*, 256 F.3d at 1072-73 (placing the burden on the government to justify its speech restrictions in a preliminary injunction hearing).

Because Pleasant Grove argued below that the relevant forum is nonpublic in nature, it did not assert a compelling interest that would justify excluding Summum's monument. The only interest Pleasant Grove asserted is an interest in promoting its history. The city's failure to offer any reason why this interest is compelling is sufficient for Summum to meet its burden in demonstrating a substantial likelihood of success on the merits. *See Pac. Frontier*, 414 F.3d at 1235 (affirming district court's conclusion that city failed to meet its burden in justifying its regulation at

preliminary injunction stage); *see also S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1146 (9th Cir. 1998) (finding that plaintiff had established substantial likelihood of success on the merits when county did not offer any reason why its interests were compelling).[7]

But even if we assume that Pleasant Grove's stated interest is compelling, the city has also failed to establish that the content-based exclusion of Summum's monument is "necessary, and narrowly drawn," to serve the city's interest in promoting its history. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). As the Supreme Court has explained, defining a governmental interest this narrowly (i.e., the promotion of the city's history in this particular park) turns the *effect* of the regulation into the governmental interest. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) (explaining that "this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly

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[7]Pleasant Grove's reliance on our decision in *City of Ogden* is misplaced. The city argues that our decision supports its use of historical relevance criteria to limit speech in this context. In *City of Ogden*, however, we simply noted that we were *not* deciding that a city "may never maintain a *nonpublic* forum to which access is controlled based upon 'historical relevance' to the given community." 297 F.3d at 1006 (emphasis added). In other words, we left open the question whether a city could limit access to a nonpublic forum based on historical relevance. More important, we did not express any opinion about the use of historical relevance criteria to justify content-based discrimination in a public forum. A content-based restriction permissible in a nonpublic forum will not necessarily survive the strict scrutiny applied to a restriction in a public forum.

tailored").

Furthermore, the city may not use content-based restrictions to advance a particular ideology. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding that state's interest in promoting "appreciation of history, state pride, and individualism" was not ideologically neutral and therefore not compelling enough to outweigh an individual's free speech rights). The city may further its interest in promoting its own history by a number of means, but not by restricting access to a public forum traditionally committed to public debate and the free exchange of ideas. *ISKCON*, 505 U.S. at 700 (Kennedy, J., concurring in judgment) (stating that government may not "assert broad control over speech or expressive activities" in a public forum, but "must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property's forum status").

In addition to the city's stated interest in promoting its history, the 2004 city resolution governing monuments in the park contains aesthetic and safety justifications for the speech restriction.[8]

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[8]The resolution contains the following preamble:

WHEREAS, there is a limited amount of park space within the city; and

WHEREAS, there are aesthetic issues surrounding the placement of permanent objects in parks and other public areas; and

WHEREAS, the City wishes to preserve its public open space; and

WHEREAS, permanent structures, displays, permanent signs and monuments, decrease the available open space and the visual perception of open space, and

WHEREAS, there are also safety issues surrounding the

Cities have substantial interests in the aesthetic appearance of their property. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507-08 (1981). To further these interests, Pleasant Grove may pass a reasonable content-neutral resolution regulating the time, manner, or place of speech in the park. For example, it could ban all permanent displays of an expressive nature by private individuals. *Pinette,* 515 U.S. at 761 (noting a "ban on all unattended displays" as a possible content-neutral restriction in a traditional public forum); *see also Ward v. Rock Against Racism,* 491 U.S. 781, 792, 796 (holding that city's regulation of sound levels in park was a content-neutral and narrowly tailored means of serving city's interest in the peaceful character of park and privacy of residential area).

Here, however, the city has furthered its objectives by passing a content-based resolution, which excludes all speech that does not meet its historical relevance criteria; the resolution is therefore subject to strict scrutiny. We need not decide whether the city's interests in aesthetics and safety are compelling because the resolution is not narrowly tailored to achieve its stated interests. The city has not offered any reason why monuments with its preferred historical content will preserve park space and reduce safety hazards more effectively than monuments containing other content. *See Solantic, LLC v. City of*

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placement of permanent objects in parks and public areas such as sight obstructions, and line of sight availability; and WHEREAS, the City wishes to insure the placement of permanent objects on public property does not create safety hazards. (Applt. App. at 55)

Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005) (holding city's sign code unconstitutional because not narrowly tailored to serve "the general purposes of aesthetics and traffic safety"); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (noting that, by allowing content-based exemptions, the government "may diminish the credibility of [its] rationale for restricting speech in the first place"). Rather, the distinction between monuments with particular historical content and monuments lacking this content "bears no relationship *whatsoever*" to the resolution's stated interests in aesthetics and safety. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993) (finding that ban on commercial newsracks lacked reasonable fit with city's interests in aesthetics and safety); *see also Riley v. National Federation of Blind, Inc.*, 487 U.S. 781, 792 (1988) (holding state's "generalized interest" was "insufficiently related" to its chosen means). The city may not burden speech that does not present the danger the regulation seeks to address: "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986). Summum's monument is similar in size, material, and appearance to the Ten Commandments monument already displayed in the park. The city's exclusion of the monument based on its content cannot be justified by an interest in aesthetics or safety.[9]

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[9]Because Pleasant Grove's restriction on monuments in the park is not necessary or narrowly drawn to serve a compelling

Because Pleasant Grove has not demonstrated that application of its historical relevance criteria is more likely than not to be justified by its stated interests, we conclude that Summum has established a substantial likelihood of success on the merits and proceed to a determination of whether Summum has satisfied its burden under the remaining three factors necessary for a preliminary injunction.

B. Irreparable Injury

The second factor we must consider in determining whether Summum is entitled to a preliminary injunction is whether Summum will suffer irreparable harm if denied an injunction. Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

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interest, we need not decide whether the city's 2004 resolution purportedly codifying its unwritten policy is a post hoc facade for content-based discrimination. *See City of Ogden*, 297 F.3d at 1006-09 (analyzing whether city's historical relevance justification was well-established policy or a post hoc facade for viewpoint discrimination); *Cornelius*, 473 U.S. at 812-13 (remanding for factual inquiry into whether government's stated reasons for restricting speech were motivated by a desire to suppress certain viewpoints). We do note, however, that the record contains little support for a well-established policy or practice of approving monuments that promote the city's pioneer history. In the "absence of express standards," such as a written policy, city officials are more likely to use post hoc rationalizations to justify their decisions; this kind of "unbridled discretion" can result in content or viewpoint discrimination. *Callaghan*, 130 F.3d at 920 (quotations omitted).

Elrod v. Burns, 427 U.S. 347, 373 (1976), *quoted in Pac. Frontier*, 414 F.3d at 1235, *and Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003). For this reason, we have assumed irreparable injury when plaintiffs are deprived of their commercial speech rights, *e.g.*, *Pac. Frontier*, 414 F.3d at 1235; *Utah Licensed Beverage Ass'n*, 256 F.3d at 1076, even though restrictions on commercial speech are subject to intermediate scrutiny, not strict scrutiny as in the case before us, *see Utah Licensed Beverage Ass'n*, 256 F.3d at 1066. If we can assume irreparable harm in the context of commercial speech, we can surely assume irreparable harm when the government deprives an individual of speech in a traditional public forum subject to the highest scrutiny. *See Heideman*, 348 F.3d at 1190 (noting that determination of irreparable harm requires consideration of "the specific character of the First Amendment claim"). Given the character of the deprivation in this case (i.e., exclusion from a traditional public forum), we hold that Summum has established it will suffer irreparable harm if the injunction is denied.

C. Balance of Harms

Next, we consider whether the First Amendment injury to Summum outweighs any prospective injury to Pleasant Grove in the event the injunction is granted. Pleasant Grove argues that it will suffer substantial harm because, if Summum is allowed to display its monument, the city will be inundated with requests from other individuals and the park will be flooded with monuments. But the city's *potential* harm must be weighed against Summum's *actual* First

Amendment injury. *O Centro,* 389 F.3d at 1009 (Seymour, J., concurring in part and dissenting in part) ("Thus, the balance is between actual irreparable harm to plaintiff and potential harm to the government which does not even rise to the level of a preponderance of the evidence."); *see also ISKCON,* 505 U.S. at 701 (Kennedy, J., concurring in judgment) ("The First Amendment is often inconvenient. . . . Inconvenience does not [however] absolve the government of its obligation to tolerate speech."). The record contains no evidence to support Pleasant Grove's contention that an injunction in this case will prompt an endless number of applications for permanent displays in the park. The city's speculative harm cannot outweigh a First Amendment injury, especially because Summum has established a substantial likelihood of success on the merits. *See O Centro,* 389 F.3d at 1010 (Seymour, J., concurring in part and dissenting in part); *Pac. Frontier,* 414 F.3d at 1236-37; *see also Wyandotte Nation,* 443 F.3d at 1256 (holding that plaintiff made strong showing regarding the balance of harms under the heightened standard for a mandatory injunction in part because plaintiff had substantial likelihood of success on the merits). We therefore hold that Summum has made a strong showing with regard to the balance of harms.

D. Public Interest

Lastly, we consider whether granting the injunction would be contrary to the public interest. We have held that preliminary injunctions which further plaintiffs' free speech rights are not adverse to the public interest. *Pac. Frontier,* 414 F.3d at 1237

("Vindicating First Amendment freedoms is clearly in the public interest."); *Utah Licensed Beverage Ass'n*, 256 F.3d at 1076 ("Because we have held that Utah's challenged statutes . . . unconstitutionally limit free speech, we conclude that enjoining their enforcement is an appropriate remedy not adverse to the public interest."); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) (holding that a preliminary injunction was not contrary to the public interest because "it will protect the free expression of the millions of Internet users both within and outside of the State of New Mexico" (quotations omitted)); *Elam Constr., Inc. v. Reg'l Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest also favors plaintiffs' assertion of their First Amendment rights."). Because an injunction requiring the city to permit the display of Summum's monument will further free speech rights, the injunction is clearly in the public interest.

CONCLUSION

We hold that Summum has met its burden under all four factors necessary for a preliminary injunction and has made the strong showing required under the heightened standard for disfavored injunctions. We therefore REVERSE the District Court's order denying Summum's motion and REMAND with instructions to grant the preliminary injunction in Summum's favor. In addition, the District Court may conduct further proceedings consistent with this opinion. We DENY as moot Summum's motion to expedite this appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

Summum, a Corporate Sole and Church, Plaintiff,	)	
vs.	)	CASE NO. 2:05-CV-638DB
PLEASANT GROVE CITY, a municipal corporation, et al., Defendants.	)	

BEFORE THE HONORABLE DEE BENSON

February 1, 2006

Motion Hearing

[26]
THE COURT : * * *
I was inclined to take this under advisement, but I think to get it moving, and I do think that there is some value in that, I'm going to deny the motion for partial summary judgment at the present time. Mr. Manion has persuaded me that if I take the facts in the light most favorable to the defendant, as I must for purposes of summary judgment analysis, there is enough to survive the motion, in my view. I am

accepting the declaration of Frank Mills to the extent that the motion to strike portions is before me, and apparently it is and that motion is denied.

I think a sufficient foundation was laid when Mr. Mills declared that he has spent his entire life in Pleasant Grove, and as a life long resident has been a part of the city government for most of the past 35 years, and he says that he is familiar with the city's practices regarding accepting donations and displaying them on city property.

I'm especially persuaded by the fact that for eight years, from 1972 to 1980, Mr. Mills was a city councilman and was the public works director from '84 to 2000. He has been [27] the city's administrator since 1998 to the present time. With that experience, he says in paragraph seven, and this is somewhat conclusory, but I think he has laid enough foundation for me to accept it as evidence. It would need to be subjected to cross-examination, of course, to see how credible it is, but he does say, quote, it has been a practice of the City of Pleasant Grove for decades to accept for display only artifacts, historic buildings, monuments, plaques, et cetera, which have some historical significance to our community or were donated by individuals or organizations with well established Pleasant Grove connections.

That needs to be explored further, including whether it is true that viewpoints containing donations were accepted simply because they were well established with Pleasant Grove connections, but on the face of it it is enough for me to at least recognize that there is a genuine issue of material fact with respect to the question which was set forth in the City of Ogden case, which is binding precedent on me,

which recognizes that historical relevance may be a factor that allows a city to have restrictions on monuments going up on public property.

I am inclined at this point to at least find that there is a factual dispute about whether this is public or non-public property, with an inclination at the present time, based on the City of Ogden case, to find that it is non-public property. But if this record can be made by the defendants [28] that the historical significance criteria is well established, then based on that precedent in the Tenth Circuit there may be a case made by the defendants that it was both reasonable and viewpoint neutral. If they make that case, then they prevail. If they don't, then the plaintiff prevails. I am not obviously ruling for either side. I'm only recognizing at this point in time that the facts are in dispute and until there is a trial, I guess before me, or unless there are some additional submissions by way of summary judgment, which I'm not precluding, but I am not anticipating either, I guess we'll have to await that day.

That takes care of, that discussion that I have just made, takes care of the pending motion for preliminary injunctive relief as well and for the same reasons. It is not clear and it has not been established that there is a substantial likelihood of success on the merits for the plaintiff, and especially because, as I understand it, the only thing that the plaintiff is seeking by way of preliminary injunctive relief at the present time is the entitlement to put up Summum's monument in the city park. That would be premature at this point given the Court's ruling on partial summary judgment.

I'm accepting both declarations and overruling the motion to exclude them. I'm denying the motion for

partial summary judgment and denying the pending motion for preliminary [29] injunctive relief. I'm not ruling on the motion with regard to the service of process. That is not ripe.

With respect to the motion for judgment on the pleadings regarding the affirmative defenses, I don't know if you wanted to argue that today, but I could give a written opinion on that if you would like. I don't know that I need further oral argument. I don't know how much it advances the ball in any event, and it is extra work, but I will be glad to do a written opinion, or I will hear you out today if you want that.

* * *

MR. BARNARD: I think our arguments are in the writings, the papers we submitted.

THE COURT: I do too. That is why I can do it in writing.

MR. MANION: I agree with Mr. Barnard on that, Your Honor.

THE COURT: Okay. Some of them will be gone, I'm telling you now, and some of them will remain. I don't think, for what it's worth, think it is going to alter the course of this litigation in any way that is significant.

* * *

APPENDIX C

SUMMUM VS. PLEASANT GROVE CITY,
Case No. 2:05-CV-638DB
United States District Court, District of Utah,
Central Division
Docket Report

02/02/2006

Minute Entry for proceedings held before Judge Dee Benson: Cnsl present. After arguments were heard and discussion held, Crt ruled: denying 9 Motion for Partial Summary Judgment, denying 10 Motion for TRO, denying 10 Motion for Preliminary Injunction, taking under advisement 13 Motion for Judgment on the Pleadings, denying 23 Motion to Strike. Court will file an order/opinion on the motion for judgment on the pleadings. Motion Hearing held on 2/2/2006 re 10 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Summum,, 9 MOTION for Partial Summary Judgment filed by Summum,, 13 MOTION for Judgment on the Pleadings filed by Summum,, 23 MOTION to Strike filed by Summum,. Attorney for Plaintiff: Brian Barnard, Attorney for Defendant Francis Mannion and Geoffrey Surtees. (Court Reporter Ed Young.) (reb,) (Entered: 02/02/2006)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

SUMMUM,

Plaintiff,

vs.

PLEASANT GROVE City, et al.,

Case No. 2:05cv00638

Defendants

Judge Dee Benson

ORDER

This case arises from a dispute concerning a Ten Commandments monolith located in a Pleasant Grove park. Summum petitioned Pleasant Grove to allow it to erect a monument embodying its Seven Aphorisms in the same park. Pleasant Grove denied the request and Summum sued. Summum now moves for judgment on the pleadings with respect to Pleasant Grove's affirmative defenses. For the reasons set forth below, the motion is granted in part and denied in part.

ANALYSIS

"A motion for judgment on the pleadings under Rule 12(c) is treated as a motion to dismiss under rule 12(b)(6)." *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000); *see also Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 528 (10th Cir. 1992). Dismissal under Rule 12(b)(6) is proper "only when it appears that the plaintiff can prove no set facts in support of the claims that would entitle the plaintiff to relief." *See Id.* (Citations omitted). Well-pleaded allegations in the complaint are accepted as true and construed in the light most favorable to the non-moving party. *See Id.* (Citations omitted).

Summum moves for judgment on the pleadings with respect to Pleasant Grove's first through eighth and tenth through twelfth affirmative defenses. Pleasant Grove's first three affirmative defenses concern stating a claim, subject matter jurisdiction, and standing. Because Summum must state a claim and have both subject matter jurisdiction and standing in order to proceed, the Court will consider each in turn.

Dismissal for failure to state a claim "[s]hould not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sutton v Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (Citations omitted). The present action is similar to *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997). In *Callaghan*, Summum brought a § 1983 action based on Salt Lake County's refusal to allow Summum to erect a monolith displaying its

tenets on the county courthouse's front lawn. The Tenth Circuit ruled, "We conclude that Summum's amended complaint sufficiently alleges that a limited public forum has been created and that the County engaged in viewpoint discrimination in violation of Summum's free speech rights." *Id.*, at 919. As it did in *Callagham*, Summum has sufficiently alleged that Pleasant Grove engaged in viewpoint discrimination in violation of the Constitution. For this reason, the Court finds that Summum has met the requirements for stating a claim.

District courts have original jurisdiction over civil actions bought "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution." *See* 28 U.S.C. § 1343(a)(3) (1948). Summum has claimed a violation of the First Amendment of the United States Constitution. This constitutes a civil action bought to redress a violation of a right under the Constitution, therefore, this Court's jurisdiction is proper.

In order to establish standing, a plaintiff must meet three requirements.:

> First, the Plaintiff must have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly . . . traceable to the challenged action of the defendant, and not the result [of] the independent action of some third party not before the Court. Third, it

> must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision.

Initiative and Referendum Institute v. Walker, 161 F.Supp.2d 1307, 1309-10 (D. Utah 2001) (Citations omitted). In the present case, Summum has suffered an injury in fact. It was not allowed to erect its desired monument. This injury is actual and concrete. Pleasant Grove acknowledges that it denied Summum's request. A decision in Summum's favor would redress the injury. This Court finds that Summum has met the requirements for standing. Because Summum has stated a claim and met the requirements for subject matter jurisdiction and standing, its motion for judgment on the pleadings for these defenses is granted.

Pleasant Grove's fourth through eighth and tenth through twelfth affirmative defenses raise substantive defenses to Summum's complaint and the extent of potential recovery. Pleasant Grove argues that the park is a nonpublic forum and decisions concerning the erection of monuments are based on historical relevance. In *City of Ogden*, the Tenth Circuit expressly stated that historical relevance may be a valid criteria for deciding which monuments may be erected on nonpublic fora. *See Summum v City of Ogden*, 297 F.3d at 1006-7. The Court stated, "We do not conclude that a municipality may never maintain a nonpublic forum to which access is controlled based upon historical relevance to the given community. *Id.* In the present case, Pleasant Grove argues that the park is a nonpublic forum and that it denied Summum's request based on the criterion of historical relevance. It has advanced a set of facts, including

sworn testimony and a resolution establishing criteria for the erection of monuments, supporting its argument. Pleasant Grove's argument supports its fourth through eighth and tenth through twelfth affirmative defenses. For this reason plaintiff is not entitled to judgment on the pleadings with respect to those affirmative defenses.

CONCLUSION

Summum has standing, jurisdiction, and has properly stated a claim; therefore, judgment on the pleadings is GRANTED as to Pleasant Grove's first, second and third affirmative defenses. Summum, however, has failed to establish that Pleasant Grove cannot in any way support its fourth through eighth and tenth through twelfth affirmative defenses. For this reason, judgment on the pleadings for those defenses is DENIED.

IT IS SO ORDERED.

DATED this 9th day of February, 2006.

/s/_____
Dee Benson
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church,

Plaintiff - Appellant/
Cross-Appellee,

v. No. 06-4057

DUCHESNE CITY, a governmental entity, et al.,

Defendants - Appellees/
Cross-Appellants.

SUMMUM, a corporate sole and church,

Plaintiff - Appellant,

v. Nos. 05-4152, 05-4168, 05-4272 & 05-4282

PLEASANT GROVE CITY, municipal corporation, et al.,

Defendants - Appellees.

ORDER
Filed September 5, 2007

Before **TACHA**, Chief Circuit Judge, **EBEL**, Circuit Judge, and **KANE**,* District Judge.

This matter is before the court on the Defendants' motions to stay the issuance of the mandates in the above captioned appeals. The motions are granted

Entered for the Court,

/s/_____
ELISABETH A. SHUMAKER
Clerk

*Honorable John L. Kane, Jr., Senior District Judge for the District of Colorado, sitting by designation.

APPENDIX F

No. 06-4057, Nos. 05-4162, 05-4168, 05-4272 & 05-4282

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMUM, a corporate sole and church, Plaintiff-Appellant,

v.

PLEASANT GROVE CITY, a municipal corporation; JIM DANKLEF, Mayor; MARK ATWOOD, City Council Member; CINDY BOYD, City Council Member; MIKE DANIELS, City Council Member; DAROLD MCDADE, City Council Member; JEFF WILSON, City Council Member; CAROL HARMER, former City Council Member; G. KEITH CORRY, former City Council Member; FRANK MILLS, City Administrator, Defendants-Appellees.

and

SUMMUM, a corporate sole and church, Plaintiff-Appellant/Cross-Appellee,

v.

DUCHESNE CITY, a governmental entity; CLINTON PARK, Mayor of Duchesne City; YORDYS NELSON; NANCY WAGER; PAUL TANNER; DARWIN MCKEE; JEANNIE MECHAM, city

council members, Defendants-Appellees-Cross-Appellants.

August 24, 2007, Filed

ORDER

Before TACHA, Chief Judge, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, MCCONNELL, TYMKOVICH, GORSUCH, and HOLMES, Circuit Judges.

These matters are before the court on two separate petitions for rehearing, both with en banc suggestions, filed by the appellees. The petitions were filed separately and correspond to the two opinions issued in these appeals on April 17, 2007.

The requests for panel rehearing are denied by the original panel which decided these cases.

The en banc petitions were transmitted to all of the judges of the court who are in regular active service. A poll was requested. Through an equally divided vote, the decisions of the panel will stand. *See* Fed. R. App. P. 35(a); 10th Cir. R. 35.5 (noting that a majority of the active judges of the court may order rehearing en banc). Accordingly, the en banc requests are denied. Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch and Holmes would grant rehearing en banc. Judges Lucero and McConnell have filed dissents to the denial. They are attached and incorporated in this order. Judge Gorsuch has joined in Judge McConnell's dissent. Judge Tacha, writing separately, has responded. That response is also incorporated in this order.

LUCERO, J., dissenting from denial of rehearing en banc.

Because the panel's opinion will leave our circuit unnecessarily entangled in future review of time, place, and manner restrictions, and because in my judgment the panel's opinion incorrectly decides the question of the nature of the forum involved in cases of this type, I respectfully dissent from the denial of rehearing en banc. Conceptually, it is important to distinguish between transitory and permanent speech. As I see it, not unlike most public parks in America in which permanent monuments have been placed, the cases before us involve limited public fora. In limited public fora, local governments may make content-based determinations about what monuments to allow in such space, but may not discriminate as to viewpoint.

As an initial matter, I agree with the panel that these monuments do not constitute government speech. Under the *Wells* framework, the government must have exercised some control over the form and content of the speech before the fact, not merely accepted it after the fact. *Wells v. City & County of Denver*, 257 F.3d 1132, 1141-43 (10th Cir. 2001) (holding sign was government speech where the city had "complete control over the sign's construction, message, and placement"; the city "built, paid for, and erected the sign"; and corporate sponsors did not "exercise[] any editorial control over its design or content."). In these cases, the private parties conceived the message and design of the monuments without any government input, thus the speech must be considered private. *See Summum v. City of Ogden*, 297 F.3d 995, 1004-06 (10th Cir. 2002) (holding monument was not

government speech where Fraternal Order of Eagles "designed, produced, and donated the Ten Commandments Monument"; central purpose of monument was "to promote the views and agenda of the Eagles rather than the City of Ogden"; "Eagles exercised complete control over the content of the Monument, turning over to the City of Ogden a completed product"; and city only claimed to adopt views of monument "post hoc"). It follows that these cases necessarily implicate government regulation of private speech.[1]

Whether government regulation of private speech violates the First Amendment depends on context. Courts engage in forum analysis to determine whether the speaker acts in a traditional public forum, a designated public forum, or a nonpublic forum, and it is in this analysis that I differ with the panel. In identifying the type of forum involved, we first consider the government property at issue and the type of access sought. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *City of Ogden*, 297 F.3d at 1001. Only after the type of forum is identified do we ask whether it is public or nonpublic in nature. Because the government property involved in these cases consists of the city parks, and the access sought is the installation of permanent monuments, the panel correctly concludes that the relevant forum consists of permanent monuments in the city parks. *See Summum v. Pleasant Grove City*, 483 F.3d 1044, 1050 (10th Cir. 2007); *Summum v. Duchesne City*, 482

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[1]Although the monument involves a religious message, these cases properly consider the question of free speech, not establishment of religion.

F.3d 1263, 1269 n.1 (10th Cir. 2007). In the next step of the forum analysis, however, the panel asserts that the relevant forum is the entire park, regardless of the type of access sought. *Pleasant Grove*, 483 F.3d at 1050; *Duchesne*, 482 F.3d at 1269. The panel's claim that access "is relevant in defining the forum, but . . . does not determine the *nature* of that forum," *id.* at 1269 n.1, confuses the forum analysis. Only by defining the forum with reference to the access sought can a court determine the nature of that forum. *See Cornelius*, 473 U.S. at 801. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, a case which the panel cites, the Supreme Court first narrowed the forum to the mail delivery system within a school, and only then did it consider the nature of this forum; it did not simply conclude that schools in general are public fora. 460 U.S. 37, 49 (1983). *Perry* also held that a court may make conceptual distinctions in defining the forum, even if there are no physical barriers. *See Cornelius*, 473 U.S. at 801 ("*Perry* . . . examined the access sought by the speaker and defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an 'internal mail system' lacks a physical situs.") (citation omitted). As in *Perry* and *Cornelius*, Summum seeks access to a particular means of communication, but the nature of the forum necessarily hinges both on the method of communication and on the location.

The panel gives great weight to the conception that city parks are "quintessential public forums," *see Perry*, 460 U.S. at 45, but in my view, permanent displays do not fall within the set of uses for which parks have traditionally been held open to the public. In *Perry*, the Court noted that parks are "places which by *long*

tradition or by government fiat have been devoted to *assembly and debate*," and "which have *immemorially* been held in trust for the use of the public, and, *time out of mind*, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (quotation omitted) (emphasis added). As *Perry* indicates, our modern concept of the park as a public forum derives from a well-established common law right to assemble and speak one's mind in the commons. This right, however, does not extend to the type of displays at issue here, and one would be hard pressed to find a "long tradition" of allowing people to permanently occupy public space with any manner of monuments. In short, a park is a traditional public forum when access is sought to it for temporary speech and assembly, such as protests or concerts, but it hardly follows that parks have been held open since time immemorial for the installation of statues of Balto the Husky or the sword-wielding King Jagiello, to note two of the more popular attractions in New York City's Central Park.

I recognize that there is some disagreement among our sister circuits on this point, but courts consistently have given special consideration to the issue of displays installed on public land. In *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993), the Seventh Circuit held that "[t]here is no private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures." (quotation and citation omitted). The Second Circuit in *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989), determined that the city "had not created a forum in City Hall Park open to

the unattended, solitary display of religious symbols." By stating that the City of Burlington must affirmatively open the public park for this kind of use, the Second Circuit recognized that such physical occupation of park space does not fall within the scope of the traditional public forum, but rather the government must assent to such access before a forum is created. By contrast, the Ninth Circuit has held that "[n]o affirmative government action is required to open a traditional public forum to a specific type of expressive activity." *Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir. 1993). *Kreisner* acknowledged, however, that the government might close the park with respect to large unattended displays, but held that the plaintiff had failed to meet his burden of proof on this point. *Id.* This is to say, that even the *Kreisner* court has recognized that it is not a foregone conclusion that parks are traditional public fora for all uses, particularly for the installation of permanent displays.

In my view a park is not a traditional public forum insofar as the placement of monuments is concerned, but that still leaves the question of whether it is a designated public forum or a nonpublic forum. Although there is a disagreement among our sister circuits regarding the categorization of limited public fora, this circuit and recent Supreme Court opinions have treated limited public fora as a species of nonpublic fora. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001) (in a limited public forum, the state may restrict speech but many not discriminate on the basis of viewpoint (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius*, 473 U.S. at 806)); *City*

of Ogden, 297 F.3d at 1002 n.4 ("A 'limited public forum' is a subset of the nonpublic forum classification."); *Callaghan*, 130 F.3d at 914 ("In more recent cases . . . the Court has used the term 'limited public forum' to describe a type of nonpublic forum"); *see also Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 382 n.3 (4th Cir. 2006) (surveying conflicting views among the circuits). In the present cases, the city governments have not allowed the kind of "general access" or "indiscriminate use" of park property that is a hallmark of a designated public forum. *Summum v. Callaghan*, 130 F.3d 906, 915 n.13 (10th Cir. 1997) (*citing Cornelius*, 473 U.S. at 803; *Perry*, 460 U.S. at 47). Instead, they have "create[d] a channel for a specific or limited type of expression where one did not previously exist," *Child Evangelism Fellowship*, 457 F.3d at 382, and have thus established limited public fora. As discussed *supra*, the right to install permanent monuments did not previously exist in these parks, and in these cases the cities have allowed only "selective access to some speakers or some types of speech in a nonpublic forum." *Callaghan*, 130 F.3d at 916. Here, the cities have permitted a few monuments to be erected for specific purposes -- in the case of Pleasant Grove, to memorialize the city's history, and in the case of Duchesne, to honor service groups. Having created limited public fora, the cities may make reasonable content-based, but viewpoint-neutral, decisions as to who may install monuments in the parks.[2] *Cornelius*, 473 U.S. at 806.

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[2]By contrast, when the government itself speaks, it may discriminate as to both content and viewpoint. *Rosenberger*, 515

There are some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access to the limited public fora, and the need for further briefing and argument on this point is one reason why en banc proceedings are necessary. More importantly, however, the panel has given an unnatural reading to the traditional public forum doctrine, and binds the hands of local governments as they shape the permanent character of their public spaces. Although these governments may enact time, place, and manner restrictions that will give them some control over monuments in their parks, they now must proceed on the basis of the panel's faulty legal reasoning. More troubling is that such restrictions will undoubtedly be challenged in court and reviewed under a strict scrutiny standard. The panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them. Because I believe the panel's legal conclusions are incorrect, and that its decisions will impose unreasonable burdens on local governments in this circuit, I would grant rehearing en banc.

U.S. at 833

McCONNELL, J., joined by GORSUCH, J., dissenting from denial of rehearing en banc.

These opinions hold that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, they must allow everyone else to do the same, with no discretion as to content -- unless their reasons for refusal rise to the level of "compelling" interests. *See Summum v. Duchesne City*, 482 F.3d 1263, 1274 (10th Cir. 2007) (a "constitutional right exists to erect a permanent structure on public property . . . when the government allows some groups to erect permanent displays, but denies other groups the same privilege"); *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1054 (10th Cir. 2007) (the city "could ban all permanent displays of an expressive nature by private individuals" but may not exclude a monument based on its content unless the restriction serves "compelling" interests and is "narrowly tailored to achieve its stated interests"). This means that Central Park in New York, which contains the privately donated Alice in Wonderland statute, must now allow other persons to erect Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

Significantly, the religious nature of the donated

monuments is not relevant to the free speech question (though it would be to an Establishment Clause challenge). These cases happen to involve Ten Commandments monuments, but it could work the other way. A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument -- or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.

With all due respect to the panel, this conclusion is unsupported by Supreme Court precedent. None of the cases cited supports this proposition. By tradition and precedent, city parks -- as "traditional public forums" -- must be open to speeches, demonstrations, and other forms of transitory expression. But neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties. By their policies or actions, governments may create designated public forums with respect to fixed monuments, but -- contrary to these opinions -- the mere status of the property as a park does not make it so.

It is plain that the cities in these cases did not create designated public forums for the erection of permanent monuments in their parks. In the *Duchesne* case, the Ten Commandments monument is apparently the only fixed monument in the park. In *Pleasant Grove*, the other permanent structures and monuments "relate to or commemorate Pleasant Grove's pioneer history." 483 F.3d at 1047. In neither case did the city, by word or deed, invite private citizens to erect monuments of their own choosing in

these parks. It follows that any messages conveyed by the monuments they have chosen to display are "government speech," and there is no "public forum" for uninhibited private expression.

In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court considered a nearly identical monument donated by the Fraternal Order of Eagles to the State of Texas and displayed under analogous circumstances. Without dissent on this point, the Court unhesitatingly concluded the monument was a *state* display, and applied Establishment Clause doctrines applicable to government speech. *Id.* at 692 (calling the monument "Texas' display"). Various courts of appeals have reached the same conclusion on similar facts. *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772, 778, 774 (8th Cir. 2005) (Eagles monument "installed . . . by the City" and counted as "City's display"); *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003) (Eagles monument belonged to the state); *Adland v. Russ*, 307 F.3d 471, 489 (6th Cir. 2002) (donated Eagles monument constituted state speech in violation of the Establishment Clause); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001) (city's acceptance of donated Ten Commandments monument constituted state action in violation of the Establishment Clause); *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000) (city's display of Ten Commandments monument was state action violating Establishment Clause). *See also Modrovich v. Allegheny County*, 385 F.3d 397, 399-400 (3d Cir. 2004) (bronze plaque of Ten Commandments donated by private party and affixed to courthouse wall constituted government speech).

Our own leading precedent on government speech confirms these holdings.[1] *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001), involved a temporary holiday display, which was on municipal property and co-sponsored by the city and private businesses; the display included a large sign on city property thanking private donors for their contributions to the city's holiday display. The Court concluded that the message conveyed by this sign was government speech. The city, we reasoned, chose to erect the sign for its own purposes, the city controlled the content of the sign, and it determined when, where, and how the sign would be displayed. 257 F.3d at 1141-42. *Wells* employed a four-part analysis derived from the Eight Circuit's *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000), which involved the asserted right of the Missouri KKK to sponsor a segment of All Things Considered on National Public Radio.[2] In both *Wells*

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[1]To the extent *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), and *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), teach the contrary, they should be overruled.

[2]The factors were:

> (1) that "the central purpose of the enhanced underwriting program is not to promote the views of the donors;" (2) that the station exercised editorial control over the content of acknowledgment scripts; (3) that the literal speaker was a KWMU employee, not a Klan representative; and (4) that ultimate responsibility for the contents of the broadcast rested with KWMU, not with the Klan.

and *Knights*, the governmental or private character of the speech was in doubt because "ownership" could not be clearly established. Did the holiday decor belong to the city or to the private donors in *Wells*? Did the sponsorship message written by the KKK belong to that organization or to the public employee who broadcast it statewide on a state radio station?

The instant cases are easier than *Wells*, because ownership of the "speech" in these cases is clear: the Ten Commandments monument in *Duchesne* was donated by the Cole family to the City of Duchesne, and the Ten Commandments monument in *Pleasant Grove* was donated by the Fraternal Order or Eagles to the City of Pleasant Grove. At the relevant time, the cities owned the monuments, maintained them, and had full control over them. But even if ownership were not clear, the second and fourth prongs of the *Wells* test would nonetheless be dispositive: The cities exercised total "control" over the monuments, 257 F.3d at 1141, and they bore "ultimate responsibility" for the monuments' contents and upkeep. Indeed, because the cities owned the monuments, they could have removed them, destroyed them, modified them, remade them, or (following state law procedures for disposition of public property) sold them at any time. Indeed, the City of Duchesne attempted to do just that -- sell the monument along with the plot of land on which it sits. See 482 F.3d at 1266-67.[3] *Cf. Serra v. U.S. General*

Wells, 257 F.3d at 1141 (quoting *Knights of the Ku Klux Klan*, 203 F.3d at 1093-94).

[3]Indeed, the panel held that Duchesne's attempted sale of the monument is controlled by state law governing the disposition of "public property." *Duchesne*, 482 F.3d at 1272.

Servs. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988) (holding that when an artist donates or sells a piece of art to the government for public display, the artist loses control over the artwork).

The only difference from *Wells* is that in the *Summum* cases, the cities did not design these monuments. The cities, however, accepted the statues, treated them as public property, and displayed them for their own purposes on public land. The cities were under no obligation to accept the statues, and could have objected to their content. When they accepted donation of the monuments and displayed them on public land, the cities embraced the messages as their own. Similarly, Duchesne and Pleasant Grove controlled the placement of the statues, just as in *Wells* Denver bore "ultimate responsibility for the content of the display." 257 F.3d at 1142.

Once we recognize that the monuments constitute government speech, it becomes clear that the panel's forum analysis is misguided. Viewpoint- and sometimes content-neutrality are required when the government regulates speech in public forums, but the government's "own speech . . . is controlled by different principles." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995). Specifically, "when the State is the speaker, it may make content-based choices." *Id.* at 833. *See also Rust v. Sullivan*, 500 U.S. 173, 193 (1991). The government may adopt whatever message it chooses -- subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause -- and need not alter its speech to accommodate the views of private parties. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) ("Simply

because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist.") In other words, just because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing.

Other circuits have reached this conclusion in similar cases. *See Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) ("Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved."); *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) (en banc) ("even in a public forum there is no constitutional right to erect a structure"); *Lubavitch Chabad House, Inc. v. Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) ("We are not cognizant of . . . any private constitutional right to erect a structure on private property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures.").

This does not mean that the Ten Commandments monuments in Duchesne and Pleasant Grove are immune to First Amendment challenge. Rather, as government speech, they may be challenged by appropriate plaintiffs under the Establishment Clause, as applied to the States through the Fourteenth Amendment. Their validity would depend on details of their context and history, in accordance with the Supreme Court's recent decisions in *McCreary County v. ACLU*, 545 U.S. 844 (2005) and *Van Orden v. Perry*, 545 U.S. 677 (2005). We have no occasion here to speculate on the outcome of any such litigation.

The panels' decisions in these cases, however, are incorrect as a matter of doctrine and troublesome as a matter of practice. I realize that en banc proceedings are a major investment of time and judicial resources, and that we cannot en banc every case that errs. But the error in this case is sufficiently fundamental and the consequences sufficiently disruptive that the panel decisions should be corrected.

TACHA, J., response to dissent from denial of rehearing en banc.

Throughout my judicial career, I have been loath to write separately because I firmly believe that an intermediate court of appeals should speak with as much clarity and consensus as possible. I reluctantly take the unprecedented step of responding to the dissents from the denial of rehearing en banc because, left unanswered, the dissents could lead a reader to conclude that these cases present unresolved issues that are properly raised and appropriately addressed on these facts. In particular, I write to emphasize that these cases do not raise novel or unsettled questions regarding government speech. Nor do the panel decisions suggest that, when cities display permanent private speech on public property, they necessarily open the floodgates to any and all private speech in a comparable medium. Rather, the decisions follow well-established First Amendment precedent requiring that cities regulate private speech in public forums equally.

Because the opinions contain clear discussions of the legal authority on which they rely, I need not respond at length to the allegation that they are unsupported by Supreme Court precedent. I need only say that the Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis. In fact, this distinction, so crucial to the reasoning of both dissents, lacks the support of both precedent and logic. If a city allows a private message to be heard in a public park, why would the permanent nature of the expression limit the First Amendment scrutiny we apply?

As Supreme Court precedent makes clear, the type

of speech does not, and should not, determine the nature of the forum. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (holding that city's restriction on *permanent* commercial newsracks on *public sidewalks* (a public forum) was an impermissible content-based restriction on speech). If a city wishes to regulate the number of permanent private displays in a public forum, it may do so through reasonable content-neutral regulations governing the time, manner, or place of such speech. *See id.* at 429-30 ("It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral."); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (noting that a reasonable content-neutral ban on all unattended private displays in public forum would likely be constitutional, but a regulation based on content must be "necessary, and narrowly drawn, to serve a compelling state interest").[1]

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[1]Contrary to Judge Lucero's dissent, the description of the forum as "permanent monuments in a city park" does not change the nature of the forum from a traditional public forum to some kind of limited or nonpublic forum. To focus solely on the monuments (i.e., the form of speech) and ignore the underlying property would be a distortion of Supreme Court precedent, as explained above. Furthermore, the conclusion that permanent speech is more limited than transitory speech defies logic. Like temporary signs and demonstrations, permanent displays most certainly encompass the government property; indeed, permanent monuments are physically attached to and always present on the property. Unlike the speaker in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), who sought access to teachers' mailboxes, Summum did not seek access to "a forum within the confines of the government property." *Cornelius v.*

Judge McConnell's dissent would have us ignore these well-established forum principles when the government does not "by word or deed" create a designated public forum for permanent private expression. Dissent at 3. In this view, if the government has not created a designated public forum, its acceptance alone turns private speech into government speech. More important, under this approach, government acceptance of the physical *medium* of speech, not the message, is sufficient. This approach is an unprecedented, and dangerous, extension of the government speech doctrine. To make government ownership of the physical vehicle for the speech a threshold question would turn essentially all government-funded speech into government speech. But this would be an absurd result. No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text. This is because the speech conveyed by the physical text remains private speech regardless of government ownership.

NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985); rather, it sought permanent access to the physical property itself. Thus, although the relevant forum in these cases is "permanent monuments in a city park," the access sought is not the kind of limited access that allows for a more narrow definition of the forum. This is true even if we accept the view that a speaker does not have a constitutional right to erect a permanent display in a public forum. Because the cities had already permitted the permanent display of a private message, the only question properly before the panel was whether the cities could exclude other permanent private speech on the basis of content, that is, whether they could constitutionally *discriminate* among private speakers in a public forum.

Although a public school is engaging in speech activity when it selects the text, its ability to do so is based on a different line of Supreme Court cases recognizing the government's ability to make content-based judgments when it acts in particular roles (e.g., educator, librarian, broadcaster, and patron of the arts). We note this distinction in both opinions. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1052 n.4 (10th Cir. 2007); *Summum v. Duchesne City*, 482 F.3d 1263, 1269 n.2 (10th Cir. 2007).[2] In light of this precedent, the City of New York, acting as a patron of the arts, need not worry about having to erect all manner of structures based on the installation of Alice in Wonderland and other works of art in Central Park. We cannot, however, extend the reasoning of these Supreme Court decisions to allow the government to make content-based decisions concerning *all* permanent private speech in a public forum. As the panel decisions explain, the cities in these two cases were acting as regulators of private speech and not, for example, as patrons of the arts.

In short, the government does not speak just

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[2]We cite the following Supreme Court cases in both opinions: *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion) (recognizing that public library staffs may consider content in making collection decisions); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) (recognizing that broadcasters must "exercise substantial editorial discretion in the selection and presentation of their programming"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may consider content in awarding grants as such judgments "are a consequence of the nature of arts funding"). *See Pleasant Grove City*, 483 F.3d at 1052 n.4; *Duchesne City*, 482 F.3d at 1269 n.2.

because it owns the physical object that conveys the speech. Instead, as the Supreme Court has explained, the appropriate inquiry is whether the government controls the content of the speech at issue, that is, whether the message is a government-crafted message. *See, e.g., Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 560 (2005) (holding that beef advertising campaign constituted government speech because the "message set out in the beef promotions is from beginning to end the message established by the Federal Government"). The four-factor approach to government speech that we adopted in *Wells v. City and County of Denver*, 257 F.3d 1132, 1140-42 (10th Cir. 2001), reflects the Supreme Court's focus on whether the message is the government's own. But contrary to Judge McConnell's dissent, we said nothing in *Wells* that suggests our government speech inquiry turns on the ownership of the physical medium conveying the speech at issue.[3] Indeed, the second *Wells* factor cited by the dissent is not about controlling the physical medium of the speech, but about controlling the *content* of that speech. *See id.* at 1142 (finding that the city exercised editorial control over the content of the speech). A city's control over a physical monument does not therefore transform the message inscribed on the monument into city speech. If this were true, the government could accept any

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[3]Moreover, contrary to Judge McConnell's dissent, *see* Dissent at 4, the city's ownership of the holiday display in *Wells* was clearly established. *Wells*, 257 F.3d at 1139 (noting that, as a factual matter, "Denver owns each component part of the display").

private message as its own without subjecting the message to the political process, a result that would shield the government from First Amendment scrutiny and democratic accountability.

This is in fact the result that Judge McConnell's dissent advocates, and it is most apparent in the dissent's equation of government endorsement in the Establishment Clause context with government speech under the Free Speech Clause. Citing *Van Orden v. Perry*, 545 U.S. 677 (2005), the dissent emphasizes that the Supreme Court has characterized a Ten Commandments monument under analogous circumstances as a "state display" for purposes of the Establishment Clause. *See id.* at 692 (holding that "Texas' display of this monument" did not violate the Establishment Clause). The simplest response to this observation is that a state's display of a monument is not necessarily state speech; if the government *displays* a private religious message, its display may be challenged under the Establishment Clause regardless of whether the government adopted the monument's message as its own. *See Pleasant Grove City*, 483 F.3d at 1047 n.2 (explaining that the government may violate the Establishment Clause without directly speaking). *Van Orden* and the circuit cases cited by the dissent stand for the simple proposition that a city's acceptance and display of a privately donated monument with religious content may constitute state *action* violating the Establishment Clause. But none of these cases supports the proposition that, when the state acts to accept a monument, it automatically turns the

message that monument conveys into state speech.[4]

On a broader note, because the Establishment and Free Speech Clauses serve different purposes, discussions of state action in Establishment Clause cases are not germane to a determination of when the government speaks for purposes of the Free Speech Clause. Indeed, the Supreme Court has analyzed government speech differently in the context of free speech, recognizing the differing theoretical justifications underlying the Establishment and Free Speech Clauses. In the Establishment Clause context, government speech favoring or disfavoring religion is a concern because of the effect it may have on individual members of the political community: "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Indeed, in deciding that a student-led "invocation" permitted by school policy could "not properly [be] characterized as 'private speech'" under the Establishment Clause, the Supreme Court focused explicitly on the message that government *sponsorship* sends members of the community: "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the

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[4]In fact, one case cited in Judge McConnell's dissent contains language specifically rejecting this proposition. *Modrovich v. Allegheny County*, 385 F.3d 397, 410-11 (3d Cir. 2004) ("The fact that government buildings continue to preserve artifacts of [the country's religious] history does not mean that they necessarily support or endorse the particular messages contained in those artifacts.").

audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quotation omitted). In other words, the government's sponsorship of religion sends an impermissible "ancillary message" that renders the speech not entirely private.

The same concerns do not underpin the Free Speech Clause. Although individuals may constitutionally challenge government sponsorship or endorsement of religion, they generally have no constitutional right to challenge government speech under the Free Speech Clause. In the free speech context, the fact that government speech is exempt from constitutional challenge is justified because it is subject to the political process:

> The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."

Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). That is, the latitude that government speech enjoys in the free speech context is justified by the "*political safeguards*" in the democratic process that set government speech

"apart from private messages." *Johanns*, 544 U.S. at 563 (emphasis added). Thus, its immunity from constitutional challenge under the Free Speech Clause does not depend on whether the "reasonable observer," familiar to Establishment Clause jurisprudence, would perceive the government as speaking.

Rather, if citizens object to the government's message, they may elect new representatives who "later could espouse some different or contrary position." *Southworth*, 529 U.S. at 235. But in order for citizens to be able to hold the government accountable for its speech, the government must speak subject to "traditional political controls [that] ensure responsible government action." *Id.* at 229; *see also Johanns*, 544 U.S. at 560-64 (concluding that promotional program was subject to adequate safeguards because its message was prescribed by federal law and the government supervised and controlled the program and the contents of its message). The speech in these cases was not subject to political safeguards; the facts simply do not implicate government speech because the cities exercised no control over the content of the messages.

Thus, in the context of the Free Speech Clause, we cannot extend the government speech doctrine any further. To extend government speech to the context before us would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own. Moreover, because the Establishment Clause would apply only to religious expression, an expanded government speech doctrine would effectively remove the government's regulation of permanent non-religious speech from all First Amendment scrutiny. Such an approach is clearly

contrary to established First Amendment principles. *See Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 795-96 (4th Cir. 2004) ("The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process."). Because this approach to government speech is unsupported by Supreme Court precedent and the purposes of the First Amendment, this Court may not consider it. And because the relevant law and its application are clear, en banc consideration is inappropriate.

APPENDIX G

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

APPENDIX H

RESOLUTION NO. 2004-019

A POLICY GOVERNING PLACEMENT OF PLAQUES, STRUCTURES, DISPLAYS, PERMANENT SIGNS AND MONUMENTS IN CITY PARKS AND ON PUBLIC PROPERTY.

WHEREAS, there is a limited amount of park space within the city; and

WHEREAS, there are aesthetic issues surrounding the placement of permanent objects in parks and other public areas; and

WHEREAS, the City wishes to preserve its public open space; and

WHEREAS, permanent structures, displays, permanent signs and monuments, decrease the available open space and the visual perception of open space, and

WHEREAS, there are also safety issues surrounding the placement of permanent objects in parks and public areas such as sight obstructions, and line of sight availability; and

WHEREAS, the City wishes to insure that placement of permanent objects on public property does not create safety hazards.

Therefore, the City desires to adopt a policy

regarding placement of plaques, structures, displays, permanent signs and monuments on public property.

I. Process for Placement of Permanent Objects on Public Property.

1. Prior to any permanent object such as plaques, structures, displays, signs, and monuments being placed on public property approval must be obtained from the City Council.

2. Requests for placement or offers of donation shall be made through the Director of Leisure Services. A brief description of the proposed item including the item's dimensions, along with any available photographs, drawings artist's renderings, etc. and a description of the proposed placement location should be submitted with the request.

3. The Director shall then submit the request to the City Council for their consideration and acceptance or denial.

II. Criteria for Placement.

The City Council shall consider the following criteria before accepting offers to place any plaque, structure, display, permanent sign, or monument in a public park or on public property in the City of Pleasant Grove.

1. The item must directly relate to the history of Pleasant Grove and have historical relevance to

the community. Factors to be considered in making this determination include, but are not limited to:

(A) It is at least fifty ("50") years old

(B) It is directly associated with events of historic significance in the community.

(C) It commemorates some significant event in the City's history .

(D) It is closely associated with the lives of persons who were of historic importance to the community.

(E) It exhibits significant methods of construction of materials that were used within the historic period

(F) It is associated with events that have made a significant contribution to the broad patterns of history of the City, State, or the United States.

(G) It embodies distinctive characteristics of a type, period, or method of construction or it represents the work of a master, or possesses high artistic value or represents a significant and distinguishable entity whose components may lack individual distinction.

(H) It has yielded or may be likely to yield information important in prehistory, or history (i.e., archeological finds).

2. It is being donated by an established Pleasant Grove civic organization with strong ties to the community, or

3. The donors have a historical connection with Pleasant Grove City; and

4. Placement does not create any safety hazards; and

5. It is not obscene.

III. Additional Considerations.

If the item meets the above-listed criteria, then the Council shall consider the proposed location of the item and evaluate the aesthetics of the proposed placement, the effect said placement will have on the remaining open space on the public property, any safety issues, and any other visual or practical effects of locating the item on the proposed site. Based upon the factors listed, the council shall make the final determination as to whether the item shall be accepted and where the item shall be placed.

IV. The provisions of this Resolution shall take effect immediately.

APPROVED AND ADOPTED BY THE CITY COUNCIL OF PLEASANT GROVE, UTAH, this 3rd day of August, 2004.

/s/_____
Jim A. Danklef, Mayor

[Pleasant Grove City, Utah
Corporate Seal]

[Attestation]

APPENDIX I

Examples of Government Properties within the Tenth Circuit with Donated Permanent Displays

Each entry is indexed in SIRIS, the Smithsonian Institution Research Information System, and may be searched and reviewed online using the SIRIS Control Number provided. The SIRIS search page is found at http://siris-collections.si.edu/search/.

I. Replica Statues of Liberty and The Boy Scouts of America's "Strengthen the Arm of Liberty" Project[1]

– *Colorado Locations*

City Hall, Colorado Springs
SIRIS No. CO000057

Lakeside Park, Loveland
SIRIS No. CO000374

County Courthouse, Sterling
SIRIS No. CO000354

County Courthouse, Trinidad
SIRIS No. CO000375

– *Kansas Locations*

Fike Park, Colby
SIRIS No. KS000301

County Courthouse, Eldorado

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[1]For a brief history of the BSA 40th Anniversary Project that resulted in purchases of replica Statues of Liberty (sometimes called the "Little Sisters of Liberty") by Boy Scout Troops and their supporters, donation of these replicas to government bodies, and their placement on display in communities around the Nation, *see* www.americanprofile.com/article/3455.html.

SIRIS No. KS000238
County Courthouse, Garden City
SIRIS No. KS000395
Courthouse Square, Garnett
SIRIS No. KS000402
Roadside Park, Harlan
SIRIS No. KS000302
Public Library, Hays
SIRIS No. KS000156
Intersection of Penn & Locust, Independence
SIRIS No. KS000323
City Park, La Crosse
SIRIS No. KS000396
City Hall grounds, Leavenworth
SIRIS No. KS000247
519 N. Kansas, Liberal
SIRIS No. KS000300
Gateway Park, Pratt
SIRIS No. KS000265
Lincoln Park, Russell
SIRIS No. KS000397
Oakdale Park, Salina
SIRIS No. KS000401
City Park Square, St. John
SIRIS No. KS000324
County Courthouse, Troy
SIRIS No. KS000399
County Courthouse, Washington
SIRIS No. KS000303
– *Oklahoma Locations*
City Park, Cushing
SIRIS No. OK000143
North Blvd. at 2nd Street, Edmond
SIRIS No. OK000142

County Courthouse, Enid
SIRIS No. OK000104
County Courthouse, Miami
SIRIS No. OK000039
Spaulding Park, Muskogee
SIRIS No. OK000049
County Courthouse, Oklahoma City
SIRIS No. OK000147
County Courthouse, Wewoka
SIRIS No. OK000144
County Courthouse, Enid
SIRIS No. OK000273
– *Wyoming Location*
County Courthouse, Torrington
SIRIS No. WY000055

II. "Spirit of the American Doughboy" Statues[2]
– *Utah Locations*
Intersection of Main and Center Streets, Beaver
SIRIS No. UT000176
10 N. Main Street, Mt. Pleasant
SIRIS No. 47260115
Price Street Peace Garden, Price
SIRIS No. UT000119
East Main Street, Vernal
SIRIS No. 47260116
– *Wyoming Location*
Bunning Park, Rock Springs
SIRIS No. 47260134

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[2]For a brief discussion of the Spirit of the American Doughboy statue replicas, *see* http://members.tripod.com/doughboy_lamp/earlspages/index.html.

III. Daughters of the American Revolution and Statues of the Madonna of the Trail[3]

– *Colorado Location*

Colorado Welcome Center, Lamar
SIRIS No. CO000373

– *Kansas Location*

Madonna Park, Council Grove
SIRIS No. KS000403

– *New Mexico Location*

McClellan Park, Albuquerque
SIRIS No. NM000042

IV: Displays on Federal Properties

– *Colorado Locations*

Sculpture, Pegasus, Arnold Hall, United States Air Force Academy, Colorado Springs
SIRIS No. CO000402

Sculpture, Tuskegee Airman, Cadet Honor Court, United States Air Force Academy, Colorado Springs
SIRIS No. CO000061

WWI Overseas Flyer Monument, Cadet Honor Court, United States Air Force Academy, Colorado Springs
SIRIS No. CO000086

Sculpture, War Memorial, Cadet Air Gardens, United States Air Force Academy, Colorado Springs

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[3]For brief discussions of the Daughters of the American Revolution and the Madonna of the Trail Monuments, *see* www.route40.net/history/madonnas/introduction.shtml and www.stjohnks.net/santafetrail/research/madonna-of-the-trail.html and www.alphabicycle.com/AL/index.html.

SIRIS No. CO000400
Sculpture, Henry Arnold, Traffic Circle, United States Air Force Academy, Colorado Springs
SIRIS No. CO000442
Sculpture, Gen. Mitchell, Cadet Air Gardens, United States Air Force Academy, Colorado Springs
SIRIS No. CO000085
Sculpture, Orville Wright, Fairchild Hall, United States Air Force Academy, Colorado Springs
SIRIS No. CO000568
Sculpture, Wilbur Wright, Fairchild Hall, United States Air Force Academy, Colorado Springs
SIRIS No. CO000569
Sculpture, Iron Mike, Post Headquarters, Ft. Carson
SIRIS No. CO000576

– *Kansas Locations*

William White Memorial, U.S. Post Office, Eldorado
SIRIS No. KS000647
Sculpture, The Letter, Churchill Army Reserve Center, Lawrence
SIRIS No. KS000515
Sculpture, Old Trooper, Cavalry Parade Field, Ft. Riley
SIRIS No. 76000615

– *New Mexico Location*

Kit Carson Memorial, U.S. Courthouse, Santa Fe
SIRIS No. NM000120

– *Oklahoma Location*

Sculpture, The Fighting Doughboy, Veterans Affairs Medical Center, Muskogee
SIRIS No. 47260092

V: Miscellaneous Displays

– *Colorado Location*

Statue, General Nathaniel Lyon, County Courthouse, Boulder
SIRIS No. CO000130

– *Kansas Locations*

Sculpture, John Brown, John Brown Memorial State Park, Osawatomie
SIRIS No. KS000523

Statue, WWI Doughboy, 4th and Leonard Streets, Onaga
SIRIS No. KS000626

– *New Mexico Locations*

Sculpture, The Hand of Friendship, La Luz de Amistad Park, Albuquerque
SIRIS No. NM000050,

Monument, Decalogue, County Courthouse, Albuquerque
SIRIS No. NM000053

Sculpture, Memorial Triangle, Monroe and Railroad Street, Clayton
SIRIS No. NM000417

Persian Gulf War Monument, Veterans' Park, Deming
SIRIS No. NM000474

L. Bradford Prince Memorial, Ft. Marcez State Monument, Santa Fe
SIRIS No. NM000365

Sculpture, The Sentinel, Fort Selden State Monument, Radium Springs
SIRIS No. NM000513

– *Oklahoma Locations*

Statue, The Critic, Shepler Park, Lawton

SIRIS No. OK000165

Sculpture, Crossing the Red, County Courthouse, Altus
SIRIS No. OK000168

Statue of WWI Doughboy, Public Library, 120 W. Main Street, Enid
SIRIS No. OK000196

Statue, Will Rogers, Will Rogers Park, Oklahoma City
SIRIS No. OK000121

Statue, Pioneer Woman, Pioneer Woman State Museum, Ponca City
SIRIS No. 76009570

– *Utah Locations*

Sculpture, Victory, City Park, Springville
SIRIS No. UT000067

Sculpture, Pioneer Mother, S. Main Street, Springville
SIRIS No. 76005764

Sculpture, Constitution and Flag, City/County Building, Salt Lake City
SIRIS No. UT000109

– *Wyoming Locations*

Statue, Robert Burns, City Park, Cheyenne
SIRIS No. WY000023

Sculpture, Albany County War Memorial, 6th Street and Ivinson Avenues, Laramie
SIRIS No. WY000087

Sculpture, Uintah County War Memorial, County Courthouse, Evanston
SIRIS No. WY000090

Sculpture, The Fountainhead, City Hall, Casper
SIRIS No. WY000069

OPPOSITION BRIEF

86

(5)

No. 07-665

FILED
FEB 21 2008
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, ET AL.,
Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Pleasant Grove City owns and operates a city park that contains numerous permanent displays donated by private parties. Among them is a monument donated by the Fraternal Order of Eagles, with an engraved depiction of the Ten Commandments. The City historically has treated the Eagles monument as private speech, and took no pre-litigation steps to adopt that speech as its own. Instead, the City adopted a formal access policy establishing the criteria under which any private citizen may provide its own monument for display.

Based on these facts, the Tenth Circuit held that the Eagles monument is part of a traditional public forum, and that the City is barred under the Free Speech Clause of the First Amendment from discriminating among private speakers absent a compelling reason. The question presented is:

Whether the Tenth Circuit erred in reaching the narrow and fact-specific conclusion that where the government takes no pre-litigation steps to adopt as its own the speech contained on a donated monument, displayed in a city park pursuant to a formal access policy for such monuments, the monument remains private speech for purposes of the Free Speech Clause.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This is an unusual case. Pleasant Grove City accepted a privately-donated Ten Commandments monument for display in its public park, along with other privately-donated displays. Though Tenth Circuit law made clear that the City could adopt the speech on the monument as its own, making it "government speech" for Free Speech Clause purposes, the City declined to do so. Instead, it formalized an access policy, establishing official criteria under which other private parties might display their own monuments in the park. Pursuant to those criteria, the City displays permanent monuments in its park not in order to convey the government's own speech, and not because the City approves the message (such as the Ten Commandments) on those monuments, but for other reasons, including that the private donor of the speech is said to have strong ties to the community.

Because the narrow and fact-specific decision below – a decision on a motion for a preliminary injunction – turns on the City's own treatment of the Ten Commandments monument as private speech, it does not implicate, and would not give this Court a chance to address, any broader issues concerning the line between government and private speech under the Free Speech Clause. Likewise, because the court held only that the government may not discriminate among private speakers in a traditional public forum, the decision does not raise any broader issues concerning forum analysis. Nor does it conflict with any decision of another court of appeals, for the simple reason that the other federal circuits have yet to

address the uncommon factual situation presented here. There is no reason for this Court to grant certiorari.

STATEMENT OF THE CASE

A. Legal Background

Petitioners argued this case below on the theory that the City's park constituted a "nonpublic," rather than a "public," forum for *private* speech. *See infra*, at 7-8. But it has now switched gears, arguing here that this case actually is about the predicate question of whether the relevant speech – the Ten Commandments monument – is in fact private at all, or is instead the City's own speech. Pet. 1-3. Because that question was not squarely presented to it, the court below had no occasion to address it in any depth. The court was, however, writing against the backdrop of Tenth Circuit precedent regarding the line between private and government speech. Because that precedent necessarily informed the reasoning of the court – and is the subject of petitioners' current challenge, *see* Pet. 18-19 (objecting to entire line of Tenth Circuit cases) – we describe it briefly here.

The Tenth Circuit, borrowing from the Eighth, applies a context-specific, four-factor test to determine whether the government is speaking when it permits a privately-donated display on government property. In some cases, according to the Tenth Circuit, despite the private origins of the speech, the government acts in a way that effectively adopts the speech as its own, making it "governmental" for purposes of the Free Speech Clause and allowing the government to draw content- and viewpoint-based

distinctions among displays. *See Wells v. City & County of Denver*, 257 F.3d 1132, 1143 (10th Cir. 2001); *Summum v. City of Ogden*, 297 F.3d 995, 1005 (10th Cir. 2002) (considering whether City has "effectively adopt[ed] the speech" of a donated monument). In other cases, the government's relationship to the speech is such that the speech remains private and the government is left with less latitude to make content- or viewpoint-based distinctions or, as here, to discriminate among speakers. *Id.*

The leading case in the Tenth Circuit is *Wells*, in which the court of appeals considered whether a "Happy Holidays" sign listing private sponsors of a holiday display, owned and displayed by the government, constituted private or government speech. Adopting the Eighth Circuit's analysis, the court considered (1) whether the "central purpose" of the display was to promote the views of the government or the private party; (2) which party "exercise[d] editorial control" over the content of the display; (3) which party was the "literal speaker"; and (4) which party bore "ultimate responsibility" for the contents of the display. *Wells*, 257 F.3d at 1141 (citing *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir. 2000)). Under the facts of that case, the court determined that the government was the relevant speaker.

A year later, in *Ogden*, the court considered the status of another Ten Commandments monument, also donated by the Eagles, this time installed on the lawn of a city's municipal building. 297 F.3d at 997. The court rejected the city's claim that the monument was government speech, finding that three of the *Wells* factors pointed instead to private speech:

the "central purpose" of the monument was to advance the views of the Eagles, rather than those of the city; the city maintained no editorial control over the content of the monument, which was donated as a "completed project"; and the Eagles were the "literal speaker," as they "composed the speech" on the monument without city input. *Id.* at 1004-05. Importantly, the court made clear that even in light of those factors, the city still had the option of adopting the monument speech as its own and making it government speech for purposes of First Amendment analysis – in which case it could be much more discriminating. The problem, the court held, was that the city did not adopt the speech as its own – by way of City Council resolution – until four months *after* the commencement of litigation. *Id.* at 1005-06.

The decision below does not address the *Wells* framework expressly because the City never raised the issue. Nevertheless, the court of appeals acted in accord with this well-established and reasonable context-specific manner of determining when a government adopts private speech as its own, and properly premised its decision on the fact that the City had not adopted as its own the content of the Ten Commandments monument.

B. Factual Background

Petitioner Pleasant Grove City ("the City") is a municipality in Utah County, Utah, that is home to Pioneer Park. Pet. 4. That city park contains a number of monuments and other permanent displays, among them a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971, just two years after the Eagles established a

local chapter in Pleasant Grove. Pet. App. 2a. The City accepted the monument without taking any steps to adopt the Eagles' speech – i.e., a particular version of the Ten Commandments – as its own.

Summum is a corporate sole and church founded in 1975 and headquartered in Salt Lake City, Utah. In September 2003, Summum sent a letter to the City requesting permission to erect a monument that would display the Seven Aphorisms of Summum in Pioneer Park. Pet. App. 2a. Summum made clear that its monument would be "similar in size and nature to the Ten Commandments monument already present in the park." *Id.* Two months later, the City denied Summum's request, stating that the proposed monument did not satisfy the City's criteria for permanent displays on public property. *Id.* The letter advised Summum that all such displays must "directly relate to the history of Pleasant Grove" or be "donated by groups with long-standing ties to the Pleasant Grove community." *Id.* 2a-3a.

In August 2004, subsequent to Summum's request, the City adopted a formal policy establishing the criteria for acceptance of permanent displays on all public property in Pleasant Grove. Under the "Criteria for Placement," the City will permanently display a privately-donated monument if *either*: (1) the donated item itself has "historical relevance to the community," *or* (2) the donor is "an established Pleasant Grove civic organization with strong ties to the community" or has a "historical connection with Pleasant Grove City." *See id.* 1h-4h; *see also* Pet. 6. In other words, it is sufficient that the speaker – rather than the speech – be acceptable to the City, and the City largely defended display of the Eagles

monument (and rejection of the Summum monument) on that basis. *See* Br. of Appellees 21-23. Put differently, a monument displayed under the policy need not express or advance any particular government message.[1]

The City maintains that it applied its policy consistently on an informal basis long before it was formally adopted, and that the policy provided the basis for the City's acceptance of the Eagles' Ten Commandments monument and all other structures in the park, as well as rejection of the proposed Summum monument. Other than arguing at the very last stages of this litigation that its ownership of the monument makes it the speaker for doctrinal purposes, the City has never asserted that it agrees with, or wishes to publicly express, the contents of the Ten Commandments monument.

C. Proceedings Below

1. On July 29, 2005, Summum filed suit against the City and various current and former City officials in the U.S. District Court for the District of Utah under 42 U.S.C. § 1983 and the Utah Constitution. The complaint asserted violations of Summum's rights under the Free Speech Clause of the First Amendment to the United States Constitution, and the Free Speech and Establishment Clauses of the Utah Constitution. Compl. 8-9. Summum

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[1] Indeed, though the first prong of the policy appears to screen for historical relevance, broadly (and vaguely) defined, even under that prong the City does not purport to scrutinize the particular message that would be conveyed by the item in question.

sought damages and injunctive and declaratory relief. *Id.* 10-11.

Summum moved for partial summary judgment and for a preliminary injunction directing the City to permit Summum to install its monument. Summum argued that under the federal Free Speech Clause the City had "created a public forum for the display of permanent monuments." *See* Mem. in Support of Mot. for Partial S.J. & Mot. for Prelim. Inj. at 3. The City countered that the Eagles monument was part of a nonpublic forum, and that its access policy survived scrutiny because it was reasonable and viewpoint-neutral. *See* Defs.' Resp. to Pl.'s Mot. for TRO & Prelim. Inj. at 6. The City did not argue that the Eagles monument constituted government speech – a decision that allowed it to avoid the Establishment Clause questions that would be raised by a government Ten Commandments display. Rather, all parties agreed that there was a private speech forum of some kind; the only dispute was as to the *nature* of that forum.

The district court denied the motions, holding that summary judgment was precluded because there was a genuine factual dispute concerning the adoption and implementation of the City's policy. Pet. App. 2b-3b. For the same reason, the court said, it could not find that Summum had established a likelihood that it would prevail on the merits, and refused to issue a preliminary injunction. *Id.* 3b.

2. Summum appealed to the Tenth Circuit from the district court's denial of its motion for a preliminary injunction, arguing once again that the City had "created a public forum for the display of per-

manent monuments," and that its rejection of Summum's monument therefore violated the Free Speech Clause. Br. of Appellant 18. In response, the City continued to assume that there was a forum of some sort, but maintained that it had "created [a] nonpublic forum" for private speech. *See, e.g.*, Br. of Appellees 11. The City again failed to press the argument that the monument contained the City's own speech.[2]

In the decision below, the Tenth Circuit reversed the district court, holding that Summum had satisfied the criteria for issuance of a preliminary injunction, including establishing a likelihood that it would prevail on the merits. Writing for the panel, Chief Judge Tacha found that the relevant forum consisted

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[2] The City's brief suggested only in a footnote that the monument might properly be viewed as government speech, relying not on the *Wells* test, which it did not even acknowledge, but only on this Court's decision in the Establishment Clause case *Van Orden v. Perry*, 545 U.S. 677 (2005). Br. of Appellees 16 n.3. *Van Orden* had involved a "virtually identical" Ten Commandments monument donated by the Eagles, and the City asserted that the Court must have "viewed the monument as government speech, for it is understood that only government speech can violate the Establishment Clause." *Id.* That is incorrect for reasons we explain *infra* at 26-27.

The City now argues – in an apparent effort to excuse its failure to fully brief this issue before the panel – that there was "binding Tenth Circuit precedent" dictating that the monument was private speech. *See* Pet. 7. That argument is belied not only by the intensely fact-specific nature of Tenth Circuit precedent on this question, which gives municipalities the option of adopting donated monuments as their own speech, *see supra* at 4, but also by the City's assertion before the panel that *Van Orden* superseded any contrary Tenth Circuit precedent. In light of that position, the City cannot justify its failure to fully brief the issue before the panel.

of the "permanent monuments in the city park," Pet. App. 9a, and that this was a "traditional public forum," *id.* 10a. As the court explained, "the fact that Summum seeks access to a particular means of communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the *nature* of that forum." *Id.* 12a. As a result, the City's exclusion of the Summum monument was subject to strict scrutiny, under which subject-matter- and speaker-based restrictions are "presumptively invalid," and survive only if they are "'necessary to serve a compelling state interest and [are] narrowly drawn to achieve that end.'" *Id.* 13a (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The City had conceded that its policy was content-based. But having misjudged the applicable standard, it had not argued that its "interest in promoting its history" was a compelling interest, *id.* 15a, nor had it established that its policy was "necessary" and "narrowly drawn" to achieve that interest," *id.* 16a. The City's other stated interests in aesthetic and safety issues could have been advanced by non-discriminatory regulations addressed to the "time, manner, or place of speech in the park" – such as "ban[ning] all permanent displays of an expressive nature by private individuals." *Id.* 17a-18a.

In a footnote of its own, the court rejected the City's footnoted suggestion that under *Van Orden* the Eagles monument was appropriately viewed as conveying government speech. Pet. App. 3a-4a n.2. As the court explained, the fact that *Van Orden* applied the Establishment Clause to a similar monument did not resolve the separate question of

whether the monument displayed government or private speech, because "the Establishment Clause prohibits governmental endorsement of religion, which can occur in the absence of direct governmental speech." *Id.*

The City sought rehearing en banc, arguing that both the panel decision and the Tenth Circuit's prior decision in *Ogden* wrongly held that "once a municipality accepts a monument donated by a private party, the city opens a forum (be it public or nonpublic) for private speech," rendering "viewpoint discrimination . . . constitutionally impermissible." Appellees' Pet. for Rehearing En Banc 2-3. For the first time, the City argued that the court's critical error was in concluding that the donated monument remained private speech. *Id.* 3-5. In the City's view, the fact that the monument was owned by the City was alone sufficient to render the monument government speech instead of private speech, meaning there was no forum for private speech at all.

After consolidating the petition with the separate petition pending in *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007), the Tenth Circuit denied rehearing with three judges dissenting. Two judges – Judges McConnell and Gorsuch – agreed with petitioners that the Eagles monument constituted government speech. They reasoned that the monuments were not part of public fora because the cities had not, "by word or deed, invite[d] private citizens to erect monuments of their own choosing in these parks." Pet. App. 11f. Thus, "[i]t follows that any messages conveyed by the monuments they have chosen to display are 'government speech,' and there is no 'public forum' for uninhibited private expres-

sion." *Id.* 12f. The dissent attempted to distinguish *Wells* on the basis that the ownership of the display in that case was "in doubt," *id.* 14f; the court in *Wells* specifically explained, however, that the city "owns each component part of the display," 257 F.3d at 1139.

In a separate and narrower dissent, Judge Lucero specifically "agree[d] with the panel that these monuments do not constitute government speech," emphasizing that the government had no input into the design or message of the monuments. *Id.* 3f-4f. However, he disagreed on the precise nature of the forum for private speech that had been opened, concluding that the forum was more appropriately viewed not as a public forum but as a limited public forum in which government restrictions may be content-based but must be viewpoint-neutral. *Id.* 5f, 8f. In this case, he found, "[t]here are some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access to the limited public fora." *Id.* 9f.

Judge Tacha issued a response to the dissents to "emphasize that these cases do not raise novel or unsettled questions regarding government speech" or "suggest that, when cities display permanent private speech on public property, they necessarily open the floodgates to any and all private speech in a comparable medium." *Id.* 18f. If the cities wanted to regulate permanent displays of *private* speech, they could enact reasonable and content-neutral time, place, and manner restrictions, such as a ban on all such displays. *Id.* 19f. Absent such regulations, and having already accepted monuments from other speakers, the cities were required to treat all private

speakers equally. *Id.* 20f n.1 ("Because the cities had already permitted the permanent display of a private message, the only question properly before the panel was whether the cities could exclude other permanent private speech on the basis of content, that is, whether they could constitutionally *discriminate* among private speakers in a public forum.").

Judge Tacha rejected the argument that the monuments constituted government speech simply because they were owned by the cities. Under this Court's precedents, Judge Tacha explained, the government speech inquiry turns principally on whether "the message is a government-crafted message," not simply on who owns the item conveying the message. *Id.* 22f. Making the inquiry turn on "government acceptance of the physical medium of speech, not the message" would be "an unprecedented, and dangerous, extension of the government speech doctrine." *Id.* 20f. Judge Tacha also cogently explained the distinction between the speaker inquiry under the Free Speech Clause and the endorsement test under the Establishment Clause. *Id.* 23f-26f. Under the Free Speech Clause, whether the speech is that of the government or of the private party dramatically alters the doctrinal framework. By contrast, "[i]f the government displays a private religious message, its display may be challenged under the Establishment Clause regardless of whether the government adopted the monument's message as its own," because even the display of private speech may convey a message of government sponsorship. *Id.* 23f-24f.

REASONS FOR DENYING THE WRIT

Contrary to petitioners' rhetoric, the decision below does not warrant this Court's review. In holding that Summum was entitled to a preliminary injunction, the Tenth Circuit did not depart from this Court's Free Speech jurisprudence, but rather applied those precedents to very unusual facts. The result is a narrow decision that does even raise, much less decide, the broad questions presented in the petition, and therefore creates no conflict with decisions in other circuits. Simply put, certiorari is both premature and wholly unnecessary. The petition should be denied.

I. THE NARROW AND FACT-SPECIFIC DECISION BELOW DOES NOT IMPLICATE THE BROAD QUESTIONS POSED IN THE PETITION.

Petitioners portray the decision below (and the decision in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), on which it relies) as announcing a broad new rule of First Amendment jurisprudence: Any government entity that displays a privately-donated, permanent structure on public property has thereby opened a public forum for private speech, and must then take all comers (and monuments) on equal terms. *See* Pet. 1-3. But the Tenth Circuit has not adopted such a sweeping or counterintuitive doctrine.

In truth, the decision below is narrow, turning as it does on very unusual facts. This is a rare case in which a governmental body has formally adopted a written policy establishing criteria under which it will display privately-donated monuments in a pub-

lic park. It is also a case in which the local government declined, at least prior to litigation, to adopt as its own the speech displayed on the privately-donated monument in question. Indeed, the City defended its acceptance of the Ten Commandments monument largely on the basis of the identity of the speaker, not the message on the monument. *See* Br. of Appellees 21-23. The court below simply held that under those circumstances, donated monuments were part of a traditional public forum in the classic setting for such a forum – a public park. And when the government then discriminates against other speakers by refusing to display their monuments in that traditional public forum, it violates the Free Speech Clause of the First Amendment unless it can satisfy strict scrutiny. Far from the radical and far-reaching decision described by petitioners, the decision below is in fact narrow and limited in scope.

1. Perhaps most critically, the decision turns on the government's own treatment of the speech in question as private speech. Petitioners' overwrought claims notwithstanding, Tenth Circuit law makes clear that the mere fact that a monument displayed by the government is privately donated does not make the monument private speech. On the contrary, the government is free to adopt that speech as its own, making it governmental speech for Free Speech Clause purposes. *See supra* at 3-4; *Ogden*, 297 F.3d at 1004-06 (analyzing whether city has "effectively adopt[ed] the speech" on a privately-donated monument as its own). The decision below simply holds that because the City did not avail itself of that opportunity, the Ten Commandments monument remains private speech.

Here, the City historically has treated permanent displays on public property as private speech. According to the City, it has long maintained an informal access policy that establishes the criteria pursuant to which private speakers may donate permanent monuments for display on city property – a policy that was formalized after the City received Summum's proposal.[3] Under that policy, the City may accept and display a monument solely because a private donor has longstanding ties with the City, regardless of the content of the donated display. *See supra* at 5-6; Pet. App. 3h. The government cannot be said to have adopted speech as its own when it approves its display solely by reference to the identity of its donor, and in disregard of its actual content.

Indeed, consistent with its policy, the City has in fact done nothing to adopt the speech on the Ten Commandments monument as its own. It has not installed a sign at the site of the monument announcing that it reflects the City's views, nor has the City Council so declared in any other fashion. *Cf. Ogden*, 297 F.3d at 1006 (Council resolution adopting Ten Commandments monument as city's own

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[3] The court below expressed concern that the recent adoption of the policy served as a subterfuge to mask the City's content-based denial of Summum's monument. *See* Pet. App. 20a ("We do note, however, that the record contains little support for a well-established policy or practice of approving monuments that promote the city's pioneer history. In the 'absence of express standards,' such as a written policy, city officials are more likely to use post hoc rationalizations to justify their decisions; this kind of 'unbridled discretion' can result in content or viewpoint discrimination.").

speech).[4] Indeed, the only affirmative step the City has taken to adopt the monument's speech as its own is its eleventh-hour litigation strategy in this case.

As this case was litigated in the district court and before the Tenth Circuit panel, the parties agreed that there is a private speech forum for monuments in Pioneer Park; the only point of disagreement was over the precise nature of that forum, with the City maintaining that the forum is nonpublic, rather than public, so that certain content- and speaker-based distinctions might be permissible. *See supra* at 7-8. Thus, its briefing in this litigation – like the City's policy – focused on the identity of proposed speakers, emphasizing prior donors' connections to Pleasant Grove and Summum's lack of such ties,[5] without any

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[4] Because of the religious content of the speech in question here – and the City's rejection of Summum's monument – the City's embrace of the Ten Commandments as its own speech would have raised difficult Establishment Clause questions, most obviously under the fundamental Establishment Clause bar on denominational discrimination. *See Larson v. Valente*, 456 U.S. 228, 244 (1982). As a practical matter, outside the particular (and particularly difficult) context of religious expression, there is no reason that governmental entities cannot adopt privately-donated monuments as their own speech when they approve of the content of those monuments, as contemplated by Tenth Circuit case law. Thus, the effects of the decision below are likely to be limited to cases involving religious displays.

[5] Indeed, the briefing below made it painfully clear that the City did not want to provide a forum for this particular speaker. *See, e.g.*, Defs.' Mem. in Opp'n to Pl.'s Mot. for Partial S.J. 8 ("Unlike the Eagles, the Summum organization has no discernible connection, past or present, with Pleasant Grove. Summum has no church or other meeting place in Pleasant Grove. It has no members who live in Pleasant Grove. It has no historical connection with the place. The group is simply not

suggestion that the City adopted the content of the speech on the monuments it erected. It was not until it filed its petition for rehearing en banc that the City changed tactics and argued that the Eagles monument constitutes government speech. *See supra* at 10. But here, just as in *Ogden*, "the City . . . is unable to point to any *pre-litigation* evidence of the City's explicit adoption of the speech of the Ten Commandments Monument." 297 F.3d at 1006 (emphasis added). In light of the City's litigation-driven shift in positions, the Tenth Circuit was rightly concerned that its new argument amounted to no more than a "post-hoc rationalization to justify [its] decision[]." Pet. App. 19a n.9.

2. The decision is limited in a second respect, as well: It applies only to privately-donated and unsolicited displays. *Ogden*'s holding that the Eagles monument in that case remained private speech turned largely on the fact that the city played no role in shaping the message contained on the monument, but rather received the monument as a "completed product." 297 F.3d at 1004. The decision below contains no discussion on this point because the City failed to raise it. But it is clear that neither the *Ogden* holding nor the decision below would apply in a case where a state or municipality purchases or commissions a display, and is much more likely to play an active role in determining the message of the display. The holding of the court of appeals also expressly excludes from its coverage scenarios in which

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on a par with the Fraternal Order of Eagles Pleasant Grove Aerie #3372 – not in the constitutional sense; not in common sense.").

the government acts as "an educator, librarian, broadcaster, and patron of the arts." *See* Pet. App. 21f; *see also id.* at 13a n.1.

3. Finally, even as so limited, the decision below applies *only* to public parks and other public spaces that have historically been treated as traditional public fora, not to all public property. *See* Pet. App. 8a-13a. As other Tenth Circuit decisions have shown, the analysis is far different when private monuments are placed on the lawns of municipal buildings or courthouses. Those spaces have been deemed nonpublic or limited public fora, in which government decisions are subject to review only for reasonableness and viewpoint-neutrality. *See Ogden*, 297 F.3d at 1002; *Summum v. Callaghan*, 130 F.3d 906, 919 (10th Cir. 1997). *Cf. Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 781 (1995) (Establishment Clause challenge; although message of government sponsorship may arise where a government building and its immediate curtilage are involved, it is not necessarily so with respect to those places which by long tradition or by government fiat have been devoted to assembly and debate, . . . [particularly] streets and parks which have immemorially been held in trust for the use of the public") (O'Connor, J., concurring in part and concurring in the judgment) (alteration in original) (internal quotation marks omitted). The rule is quite different in a traditional public forum such as a park. In such a forum – most paradigmatically a speaker's corner – the state may not engage in the sort of speaker-based preferences at issue here (i.e., discriminating in favor of speakers with "strong ties" to the city). *See, e.g., Cornelius v. NAACP Legal Def.*

& Educ. Fund, Inc., 483 U.S. 788, 808 (1985). *See also* Pet. App. 14a n.6. Whether speaker-based preferences might be permissible in a nonpublic forum, however, is a different question altogether. *See, e.g., Perry Educ. Ass'n*, 460 U.S. at 49; *cf. Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983). Because the decision below involved only the display of monuments in a city park, an undisputed a traditional public forum, it does not govern displays on other types of public property.

* * *

Contrary to petitioners' claims, the decision below does not broadly hold that there is a constitutional right to erect structures on public property. *Cf.* Pet. 23. The city park was not a blank slate on which Summum sought to impose an unprecedented and unanticipated form of speech. To the contrary, the City had already accepted like monuments, and had virtually invited additional displays by adopting its access policy. And the City had declined to take the invitation extended by Tenth Circuit case law and adopt the speech on those displays as its own. Thus, the only question presented and decided here was whether the government may display certain private-speech structures in a traditional public forum while discriminating against the display of other structures in that same traditional public forum. *See* Pet. App. 20f n.1. That the Tenth Circuit answered that question in the negative is neither novel nor controversial. *Id.* at 18f.

II. THE PRELIMINARY POSTURE OF THIS CASE MAKES IT A POOR VEHICLE FOR REVIEW.

The early stage of litigation at which the decision below was rendered makes this case a poor candidate for this Court's review. The decision below arises not from a final judgment, but from the district court's denial of a preliminary injunction and remand for further proceedings. All that has been determined at this stage is that Summum is *likely* to prevail on the merits. Pet. App. 20a. The Court's usual practice is not to intervene during such an early stage of litigation, *see* Robert L. Stern, et al., Supreme Court Practice § 4.18 (9th ed. 2007), and there is no reason to break from that practice here.

The Tenth Circuit's ruling certainly suggests that respondent is on solid ground with respect to the merits of its arguments. But there remains at least a possibility that the City ultimately could prevail under the Tenth Circuit's precedents. Although proceedings have been stayed pending resolution of this petition, discovery continued during the appeal to the Tenth Circuit, and the parties filed cross-motions for summary judgment. On remand, perhaps following additional discovery, either party might prevail on grounds that do not implicate the constitutional questions posed in the petition.

On the one hand, it is conceivable that the City might prove that it did, in fact, adopt the Eagles' speech as its own under the *Wells* test. That factual question was not developed below, and neither party briefed or argued the issue before the district court or the Tenth Circuit panel. Alternatively, now that

the Tenth Circuit has established that the forum in question is a traditional public forum, the City might be able to prove that its rejection of the Summum monument survives the applicable strict-scrutiny standard. *See* Pet. App. 15a ("Because Pleasant Grove argued below that the relevant forum is nonpublic in nature, it did not assert a compelling interest that would justify excluding Summum's monument.").

On the other hand, Summum, too, could prevail on remand on grounds that do not implicate the questions presented in the petition. The district court might find – as the Tenth Circuit hinted, *id.* 19a n.9 – that the City engaged in viewpoint discrimination when it rejected the Summum proposal, which is prohibited under the Free Speech Clause whether the forum at issue is a public forum (as the Tenth Circuit held below) or a nonpublic forum (as the City argued below). That result would remove from the case the issue of whether the City park is properly viewed as a public or nonpublic forum – a major portion of the petition, *see*, *e.g.*, Pet. i (question 2), 22-24, and the only issue fully briefed and argued below.

Summum also could prevail on its state law Establishment Clause challenge. Though Summum did not raise a federal Establishment Clause challenge to the City's decision to display the Ten Commandments monument but not the proposed Summum monument, it did challenge that decision under the Utah Constitution's Establishment Clause – which, as Utah courts have made clear, is not coterminous with its federal counterpart. *Cf. Soc'y of Separationists v. Whitehead*, 870 P.2d 916, 940

(Utah 1993) ("The federal rulings set the floor for federal constitutional protections which we must respect in interpreting the scope of our own constitution's provisions. But the federal courts have . . . only a cryptic sentence to interpret; we have paragraphs that are expressed in clearer terms and that are given even more vivid meaning by our unique and relatively recent history."); *Snyder v. Murray City Corp.*, 73 P.3d 325, 333 n.4 (Utah 2003); *see also* James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, And Utah Constitutional Law*, 60 Alb. L. Rev. 1515, 1548 (1997) ("The need to disavow the control that the Church of Jesus Christ of Latter Day Saints exercised over Utah's political system led, in part, to the drafting of constitutional clauses that exceed the provisions found within the constitutions of other states and the United States Constitution in specificity and definitiveness."). Indeed, Summum has already moved for summary judgment on this separate ground in the district court, and resolution of this claim in favor of Summum would moot the federal Free Speech claim that is the subject of the petition.

In short, this controversy could be resolved without reference to the questions presented in the petition. Certiorari would therefore be premature even if the questions presented had been litigated and actually decided below.

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

A. There Is No Conflict Concerning Whether Privately-Donated Monuments Erected In Public Parks Without Any Clear Statement Of Government Sponsorship Constitute Government Speech For Purposes Of The Free Speech Clause.

In petitioners' view, the court below held that "monuments in city parks are not government speech but instead are the private speech of the original donors," Pet. 18, and this holding is in conflict with decisions of other circuits recognizing that "government-owned and government-controlled displays are government speech, not private speech," *id.* 19. Petitioners are wrong on both counts. As shown above, the Tenth Circuit has not established a blanket rule that privately-donated monuments in city parks necessarily constitute private speech; instead, it issued a narrow and fact-bound decision responding to the specific and unusual circumstances before it. Nor has any other circuit approved the bright-line rule petitioners seek here: that government-owned monuments displayed on public property *always* constitute government speech. *Cf. id.* 19, 21. In short, courts have adopted neither of petitioners' "conflicting" rules.

In fact, as numerous courts have held – including the Tenth Circuit, as explicated in *Wells*, *Ogden*, and the opinions below – the test for determining whether speech is governmental is always context-specific, requiring analysis of a number of factors.

Far from creating conflict, this contextual test is *common* in other circuits. *See Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000); *Ariz. Life Coalition, Inc. v. Stanton*, -- F.3d --, 2008 U.S. App. LEXIS 1795 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. v. Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002). *See also Choose Life of Mo., Inc. v. Vincent*, 2008 U.S. Dist. LEXIS 6524, at *12 (W.D. Mo. Jan. 23, 2008) (noting that "the four-factor test has been adopted by many courts"). None of the cases cited by petitioners is to the contrary, and none creates a conflict with the decision below.

1. Several of the decisions cited by petitioners turn critically on one factor decidedly absent here: that the government was acting in its capacity as "patron of the arts." The Tenth Circuit expressly *excluded* such cases from the ambit of its holding.[6] As

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[6] As the panel below explained,

> We note that the Supreme Court has chosen not to apply forum principles in certain contexts, recognizing that the government in particular roles has discretion to make content-based judgments in selecting what private speech to make available to the public. *See* . . . *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that the NEA may make content-based judgments in awarding grants as such judgments "are a consequence of the nature of arts funding"). The city in the case before us is not, however, acting in its capacity as librarian, television broadcaster, or arts patron.

Pet. App. 13a n.4; *see also id.* at 21f (J. Tacha) ("[T]here is a different line of Supreme Court cases recognizing the government's ability to make content-based judgments when it acts in particular roles (e.g., educator, librarian, broadcaster, and pa-

a result, the "patron of the arts" cases cited by petitioners simply are not in any tension with the decision below.

Thus, *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005), which held that public-forum analysis does not apply when the government solicits art from private parties, has no bearing here. The *Gittens* court relied expressly on this Court's separate treatment of decisions made in the government's role as a patron of the arts. The court noted Chief Justice Rehnquist's statement, writing for a plurality, that "'forum analysis and heightened judicial scrutiny are incompatible' with the government's role as patron of the arts, television broadcaster, and librarian." *Id.* at 29 (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 204-05 (2003)). As an arts patron, the government must inevitably make content-based decisions, because it "must 'make esthetic judgments.'" *Id.* (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998)). That is precisely the same analysis – complete with the same cited authority – that the Tenth Circuit adopted below in holding that its decision would *not* extend to cases involving the government as "patron of the arts." *See supra* n. 5; Pet. App. 13a n.4, 21f. Similarly, *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1051 (2d Cir. 1988), evaluating the First Amendment status of a sculpture commissioned by the government, relied

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tron of the arts). . . . In light of this precedent, the City of New York, acting as a patron of the arts, need not worry about having to erect all manner of structures based on the installation of Alice in Wonderland and other works of art in Central Park.").

upon the fact that the government there was acting as a "patron of the arts"; the court warned against "unwarranted restrictions on its freedom to decide what to do with art it has purchased."

Here, by contrast, and as expressly recognized by the court below, petitioners have never argued that the City was acting as a "patron of the arts." Pet. App. 21f ("the cities in these two cases were acting as regulators of private speech and not, for example, as patrons of the arts"); *id.* 13a n.4 ("The city in the case before us is not, however, acting in its capacity as . . . arts patron."). In contrast to the cases petitioners cite, the City here was not purporting to make fine aesthetic distinctions. Neither *Gittens* nor *Serra* conflicts with the decision below.

2. The other cases cited by petitioners all involve Establishment Clause claims, not Free Speech claims, and are distinguishable on that basis alone. *See* Pet. 20-21. As Chief Judge Tacha explained, the question of government endorsement of a religious message under the Establishment Clause is entirely distinct from the question of whether speech is governmental under the Free Speech Clause. *See* Pet. App. 23f-27f. "[A] state's display of a monument is not necessarily state speech; if the government *displays* a private religious message, its display may be challenged under the Establishment Clause regardless of whether the government adopted the monument's message as its own." *Id.* 23f. Thus, while governmental acceptance and display of a monument with religious content may "constitute state action violating the Establishment Clause," it does not "automatically turn[] the message that monument conveys into state speech." *Id.* at 23f-24f. *Cf.*

County of Allegheny v. ACLU, 492 U.S. 573, 600 (1989) (county's preferential placement of crèche on courthouse Grand Staircase violated Establishment Clause even where crèche itself was privately owned and was displayed with a sign disclosing its private ownership).

But even if Establishment Clause cases were relevant to the government speech question actually presented here, petitioners' remaining cases still would not be in conflict with the decision below. In *ACLU v. Schundler*, 104 F.3d 1435 (3d Cir. 1997), for example, the court addressed whether a government display of a crèche in front of City Hall – the "visible seat of government power" – violated the Establishment Clause. *Id.* at 1446. But that display, unlike the Eagles monument here, was expressly adopted by the government as its own speech, accompanied by a sign that "proudly proclaimed that the display was sponsored by Jersey City." *Id.* Thus, the *Schundler* court had no occasion to address the question presented by the facts of this case and Tenth Circuit law: whether the speech on a privately-donated monument remains private when the government *declines* to adopt that speech as its own.

Likewise, there is no conflict with *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005), which analyzed an Establishment Clause claim seeking removal of another Ten Commandments monument donated by the Eagles. Indeed, petitioners' citation of this Eighth Circuit decision is particularly inapt, given that the Tenth Circuit ex-

pressly borrowed its *Wells* test from that circuit.[7] Far from creating a conflict, it is clear that the Eighth Circuit *agrees* with the court below that: (1) different analyses are required in the context of Establishment Clause and Free Speech Clause claims; and (2) a contextual evaluation of the government speech question is appropriate in the latter scenario, rather than the rigid test proposed by petitioners. The same kind of multi-factor and context-specific analysis was adopted by the court in *Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), which rejected a "formalistic standard" in favor of "look[ing] to a number of factors" and the "varying factual backgrounds of government actions" to determine whether a government has endorsed private speech for Establishment Clause purposes. *Id.* at 491-92, 494.

In short, none of the cases cited by petitioners holds, "squarely" or otherwise, that all objects "owned and displayed by the government on government property are government speech," *cf.* Pet. at 20 (internal quotations omitted), and none creates any conflict with Tenth Circuit precedent.

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[7] *Compare* Pet. 21 ("Decisions in the Seventh and Eighth Circuits likewise acknowledge that, in cases involving expressive displays, the identity of the speaker is coincident with the party currently owning and controlling the display, not the creator or previous owner.") *with Knights of the Ku Klux Klan*, 203 F.3d at 1093-94 (crafting contextual test for identifying the speaker subsequently adopted by the Tenth Circuit in *Wells*).

B. There Is No Conflict Concerning Whether The Government Can Engage In Content-Based Discrimination Among Speakers In A Public Forum.

Petitioners also argue that the decision below conflicts with decisions in other circuits "rejecting the notion that there is a First Amendment right to erect monuments or similar displays" on government property. Pet. 23. But here again, petitioners' purported conflict rests on a bald mischaracterization of the Tenth Circuit's decision in this case.

The Tenth Circuit did not, of course, hold that private parties have some free-standing constitutional right to erect the displays of their choice on public property. Rather, it held only that once a city opens a traditional public forum for a particular form of private speech – here, the display of monuments – it may not discriminate among speakers based on the content of their speech. *See* Pet. App. 20f n.1 ("Because the cities had already permitted the permanent display of a private message, *the only question properly before the panel was whether the cities could exclude other permanent private speech on the basis of content, that is, whether they could constitutionally discriminate among private speakers in a public forum.*" (emphasis added)).

None of the decisions cited by petitioners is to the contrary. Rather, as petitioners' own citations and quotations reveal, those cases merely recite the entirely unremarkable proposition that there is no unfettered constitutional right to erect unattended structures on public property. *See* Pet. 23-24. None of those cases involved property that had otherwise

been opened to private structures – as was the case here – and none involved a claim that the government had discriminated based on content in denying certain private parties the same right to display their messages as was granted other private parties. *See Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989) (no private right to display menorah in park where city "had not created a forum in [park] open to the unattended, solitary display of religious symbols"); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) (no private right to display menorah in airport where "record [was] clear that the City ha[d] prohibited all groups from erecting structures in the airport public areas"); *Tucker v. City of Fairfield*, 398 F.3d 457, 452 (6th Cir. 2005) (relying on *Graff v. City of Chicago*, 986 F.2d 1055 (7th Cir. 1993) and *Lubavitch* for proposition that courts generally refuse to grant First Amendment right to erect permanent displays on public property).[8]

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[8] Nor is there any inconsistency on this point between the decision below and this Court's cases. Petitioners cite *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1994), but that case is inapposite. *Taxpayers for Vincent* held only that the government could ban a particular method of communication it deemed a nuisance – the posting of fliers on crosswires supporting utility poles. *Id.* at 810. It did not hold or even suggest that once the government permits one party a particular kind of access to a traditional public forum, it may discriminate based on content in awarding other parties the same access.

IV. NO PARADE OF HORRIBLES WILL RESULT FROM THE TENTH CIRCUIT'S DECISION.

Petitioners speculate that a plague of offensive monuments will clutter public spaces throughout the country if the Tenth Circuit's decision is permitted to stand. Pet. 27-29. Rhetoric aside, however, there is no merit to petitioners' bleak predictions.

Most obviously, government bodies always have the option of avoiding petitioners' parade of horribles simply by banning display of *all* privately-donated permanent structures, as a reasonable time, place or manner restriction. This Court has expressly suggested that option, *see Pinette*, 515 U.S. at 761, as did the court below, Pet. App. 18a.

But a government need not go that far. As already explained, the decision below has narrow application. It reaches only privately-donated permanent structures that are offered for display in public parks, when the government has already accepted other structures for display, has always treated those displays as private speech, and does nothing to adopt that speech as its own. *See supra*, Part I. Thus, all any governmental body must do to eliminate any ambiguity as to the status of privately-donated items is to treat them as government speech *before* litigation is initiated. This could easily be accomplished through formal resolutions by the governing body approving of the content of the monument, *see Ogden*, 297 F.3d at 1006 (city council resolution adopting speech as own), or by the installation of signs making clear that the donated items reflect the views of the government, *see Schundler*, 104 F.3d

at 1446 (display accompanied by sign stating that it was sponsored by government). In the Establishment Clause context, seven Justices agreed that the posting of signs could effectively disclaim government endorsement of the religious messages contained on public displays. *See Pinette*, 515 U.S. at 769 (plurality); *id.* at 776 (concurrence). Such measures could likewise be used to make clear that it is the government that is speaking, and not a private party.[9]

Thus, it is not true that "a city cannot accept a monument posthumously honoring a war hero without also being prepared to accept a monument that lampoons that same hero." Pet. 1. To the contrary, a city need only make clear, *prior* to the commencement of litigation, that it adopts the speech of the donated item as its own expression.[10] The only thing

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[9] This straightforward adoption of a privately-donated monument as government speech might of course raise Establishment Clause issues with respect to religious displays – particularly where the government engages in denominational discrimination. But that is a function of well-settled Establishment Clause principles, not some problem in Free Speech Clause jurisprudence that requires this Court's attention. It is not the purpose of the First Amendment to ensure that governmental entities remain free to disclaim speech as purely private when it suits their Establishment Clause needs while simultaneously avoiding the rules that generally govern the regulation of private speech.

[10] The concerns raised by veterans' groups amici, *see* Br. Amici Curiae of the American Legion, et al., are thus easily addressed by pre-litigation conduct by the government that adopts the monuments' speech as its own. Indeed, as the amici themselves note, there is reason to believe that veterans memorials would in any event be deemed government speech under the Tenth Circuit's test. In stark contrast to the facts of this case,

it may *not* do is engage in litigation games by treating donated items as private speech for decades, adopting a formal policy governing the acceptance and display of such items, and then arguing they constitute government speech only when another private party seeks equal access to a traditional public forum.

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they assert that "government officials are very involved in the development and design of the [veterans] memorials, and must approve the dimensions, design and content of the memorial," *id.* at 15 – a factor that would weigh heavily toward a finding of governmental speech under the Tenth Circuit's *Wells* test. *See supra* at 3-4 (whether government maintains "editorial control" over monument highly relevant to government-speech determination). Moreover, monuments actually commissioned *by the government* are not subject to the decision below – and indeed are not subject to forum analysis at all – for the reasons already explained.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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No. 07-665

IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, ET AL.,
Petitioners,

v.

SUMMUM, a corporate sole and church,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

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INTRODUCTION

The Tenth Circuit -- over the dissent of six judges, Pet. App. 2f -- has gone badly astray.

In its line of Summum cases[1] -- all four cases brought by the same party, respondent here -- the court below has announced the jarring rule that when a government body accepts and displays a monument donated by a private party, that government body must, absent a compelling interest, accept and display additional monuments (such as Summum's "Seven Aphorisms") on demand, as a matter of First Amendment "equal access." That holding not only severely hampers government management of parks, but also conflicts with decisions in six other circuits. Pet. §§ I, III. As petitioners and three sets of amici before this Court agree, this decision warrants review.

The Tenth Circuit's imposition of **public forum analysis** and **strict scrutiny** upon a government body's **monument selection** process ignores the reality that it is the **government** that speaks through its selection and display of monuments. As **government speech**, this "editorial discretion" in park management simply does not trigger the First Amendment limits that apply to restrictions on **private** speech. Pet. at 1-3, 18-22, 26-27; Amici Br. of

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[1] *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir.), *reh'g denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-690 (U.S. Nov. 21, 2007); *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir.), *reh'g denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-665 (U.S. Nov. 20, 2007).

Virginia et al. [States Br.] at 1-3.

Respondent Summum concedes that the decision below is "sweeping and counterintuitive," Opp. at 13, and "radical and far-reaching," *id.* at 14, if -- as is true -- petitioners have correctly described it. *See also* Pet. App. 17f (McConnell, J., dissenting) (Tenth Circuit committed "fundamental" and "disruptive" legal error); States' Br. at 2 (Tenth Circuit "ignores . . . fundamental principles"). Summum therefore strains mightily to recharacterize and minimize the decision below. Yet Summum itself ultimately admits that,

> as explained in the *Pleasant Grove* Brief in Opposition, the Tenth Circuit has held . . . that once a governmental entity opens a traditional public forum to some form of private speech -- here, the display of privately-donated monuments -- it may not discriminate against other private speakers who wish to engage in the same form of speech, absent a compelling interest.

Respondent's Br. in Opp. to Cert., *Duchesne City v. Summum*, No. 07-690 (U.S. Feb. 25, 2008), at 10 (citing Opp. in *Pleasant Grove).* That is, Summum concedes that the court below equated "privately-donated monuments" with "private speech" (despite government ownership and control), and that the government's acceptance and display of such donated works forces the government to accept and display any other speaker's proposed monument, absent a "compelling interest."

This Court should grant review of this "radical and far-reaching" decision.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Summum asserts that Pleasant Grove City accepted the Fraternal Order of Eagles' donation of a monument "without taking any steps to adopt the Eagles' speech . . . as its own." Opp. at 5. But this assertion "fails to acknowledge that the **government's display** of works donated by private parties simply represents another way in which **government speaks**," Br. of Amicus Cities of Casper et al. [Casper Br.] at 12 (emphasis added). The city accepted **ownership and control** of the monument, Pet. at 5, making the monument thenceforth a **government** display, not a private display. As Summum conceded, "the city of Pleasant Grove controls whether or not the Ten Commandments Monument remains in the park." Br. of Appellant at 5 (10th Cir. May 8, 2006). Moreover, upon the city's acceptance of the donated monument in 1971, the mayor, at an unveiling ceremony, declared that the monument "would serve to remind citizens of their pioneer heritage," Decl. of Frank Mills ¶ 10 (Ex. G-1 to Defts' Mem. in Opp. to Plff's Mot. for Partial Summary Jdgmt. (Doc. 19)). Obviously, it was the **display of the message** -- the Ten Commandments inscribed on the monument -- that would "remind" citizens of their heritage.

Summum claims that the city's monument placement **policy** (Pet. App. H) entitles private parties to donate, and compel government display of, additional monuments in city parks. Opp. at i, 5. This is plainly inaccurate. The city's internal policy sets criteria that are **necessary**, but **not** themselves **sufficient**, for acceptance and display of a proposed

monument. *See* Pet. App. 2h ("approval must be obtained from the City Council"; requests are submitted "to the City Council for their consideration and acceptance or denial"), 4h ("If the item meets the above-listed criteria, then the Council shall consider the [proposal and] make the final determination as to **whether** the item shall be accepted and **where** the item shall be placed") (emphasis added).

Summum has never asserted that the city's denial of its proposed "Seven Aphorisms" monument violated the city's policy. Under the policy, private entities can **propose** monuments, but the ultimate **authority** to decide whether a given monument comports with the city's overall vision for the park rests entirely with the city, as Summum has consistently acknowledged. *E.g.*, Plaintiff's Statement of Stipulated Facts (Doc. 11) at 3-4 (¶¶ 6, 8) (city, through city council, determines placement of monuments on city property).

Summum faults the city for not arguing in the district court or before the Tenth Circuit panel that the placement and display of monuments in its park counts as government speech. Opp. at 2, 7, 8. But as explained in the petition, controlling Tenth Circuit precedent -- the very cases Summum repeatedly insisted were controlling -- foreclosed that argument in the district court and before the panel. Pet. at 7, 9-10, 11 n.3. The city nevertheless **did** raise the argument before the panel, Pet. at 9-10, and the panel rejected it upon the authority of its prior decisions, Pet. at 10-11. More importantly, once the case reached the stage -- potential en banc consideration -- where the reviewing court would no longer be bound by prior Tenth Circuit panels, the city pressed the government speech argument with vigor, Pet. at 11-12, and all the judges

who wrote in response to the rehearing petition addressed the argument on the merits, Pet. App. 3f-4f, 11f-16f, 20f-27f.

ARGUMENT IN REPLY

The Tenth Circuit in this case ruled that once a city accepts and displays in its park a privately donated monument, the city must accept and display other privately donated monuments upon request, absent a compelling interest.

That cannot be right. The Constitution does not empower private parties to force permanent displays into a park, crowding out the available physical space and trumping the government's own vision for the park's decor or theme.

The principal analytical flaw in the decision below was the Tenth Circuit's holding -- reflecting a line of aberrant Tenth Circuit cases[2] -- that a donated monument somehow remains private speech, rather than government speech, despite the government's ownership and control of the monument. Pet. at 3. This crucial misstep led to a startling holding, namely, that the petitioner Pleasant Grove City must either remove all of the city's monuments and memorials that were originally donated, or else erect and display respondent Summum's "Seven Aphorisms" monument (and be prepared to erect and display any additional monuments upon request). Pet. at 11 & n.2.

More broadly, the decision below cements a conflict in the circuits over the government speech doctrine and the applicability of forum analysis to monuments

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[2] *See supra* note 1; Pet. at 18-19; *id.* at 7, 11 n.2.

owned, controlled, and displayed by the government. Pet. § I. The decision below also badly distorts this Court's government speech and public forum doctrines. Pet. § II. Further, the decision below creates enormous practical problems, as now any federal, state, or local government body displaying a monument that once was donated (and there are many such instances, *see, e.g.*, Pet. App. I) is a sitting target for litigation demanding the erection and display of a host of additional monuments in the name of "equal access." Pet. § III; Casper Br. at 1-5. Summum's attempts to explain away this deeply troublesome ruling lack merit.

I. SUMMUM MANUFACTURES A NOVEL "ADOPTION OF THE INSCRIPTION" REQUIREMENT.

The centerpiece of Summum's attempted recasting of the decision below is a supposed constitutional requirement that, for a government's display of a donated object to be government speech, the government must not only **own, control and display the object**, but **affirmatively "adopt" all messages inscribed** on the object. *See* Opp. at i, 4-6, 8 n.2, 12, 14-17, 19-20, 27, 31-32. According to Summum, a city "is free to adopt that speech as its own, making it governmental speech for Free Speech Clause purposes," *id.* at 14, but it must do so either by "shaping the message contained on the monument," *id.* at 17, or by expressly and formally "approving of the content of the monument," *id.* at 31. The city's mistake, Summum charges, was that the city has "done nothing to adopt the speech" inscribed on the

donated monument. *Id.* at 15.

This novel "express adoption of the inscription" requirement cannot rescue the decision below.[3]

The "adoption of the inscription" requirement Summum proposes makes no sense. A government may select monuments for a given park or plaza based upon such criteria as aesthetics, historic significance, or local ties, without necessarily subscribing to the precise messages engraved thereon. For example, a city in Kansas or West Virginia could accept and display a memorial to abolitionist John Brown, containing excerpts of his writings, without embracing the radical measures endorsed in those writings. Or a city (say, New York in its Central Park) could establish a "diversity" display reflecting the vibrancy of political debate in America; donated monuments would contain positively contradictory inscriptions. The government would not in such cases forfeit the right to select which monuments to display just because it "failed" to "adopt" the particular messages chiseled onto the various objects.

Summum fails to appreciate that government speaks by the **selection** of works for display, and not necessarily by embrace of the particular words inscribed thereon. An object may have constituent appeal, or tourism value, or simply be visually attractive to the city authorities wholly apart from any official "agreement" with any inscriptions on the

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[3]The city in fact **did** embrace **display of the message** the monument would convey. *Supra* p. 3. Thus, Summum's argument is not only legally insufficient but also factually misleading.

monument. How else to explain such displays as the Alice in Wonderland sculpture in Central Park?

A government's **acquisition and display** of an object is all the "adoption" that is necessary. To require the government to pass a resolution restating the obvious -- "we have chosen to display this monument" -- would be pointless.

Summum's "adoption of the inscription" requirement also does nothing to change the fact that a multitude of government bodies currently displaying donated monuments and memorials are now obligated, under the Tenth Circuit's ruling, to cede control over park displays to the demands of private parties. According to Summum, governments may enact formal resolutions "adopting" any messages engraved upon such objects, hoping thereby to fend off lawsuits demanding that a competing display be erected. But, as illustrated by *Summum v. City of Ogden*, 297 F.3d 995, 1005-06 (10th Cir. 2002), even such a formal "adoption" will not necessarily satisfy the Tenth Circuit.

In short, Summum's attempt to reinvent this case as merely a failure to "adopt the speech," Opp. at 15, cannot rehabilitate the pernicious ruling below.

II. SUMMUM ATTEMPTS UNSUCCESSFULLY TO MINIMIZE THE DECISION BELOW.

Summum portrays the decision below as a "narrow and fact-specific" decision. Opp. at 13. It is nothing of the kind. The only thing "very unusual" about this case is the law the Tenth Circuit embraced.

This is the fourth in a series of Summum cases. *Supra* note 1. While Summum's legal claim of "equal

access for privately donated monuments" may be odd, it is an oddity that has now prevailed in four straight cases in the Tenth Circuit (while it would clearly fail in at least six other circuits, Pet. § I). And the setting for Summum's claim -- city grounds containing a donated monument or memorial -- is so commonplace as to be well-nigh ubiquitous. All the Summum cases require for litigation is a proponent of another monument. Thus far Summum has led the charge. But Rev. Fred Phelps and others are now raising the same banner, Pet. at 27-28, with no end in sight.

Summum suggests this case has "unusual facts" Opp. at 13, because the city did not take the additional step of expressly adopting the inscriptions on the donated monuments. Even aside from the defects in Summum's "adopt-the-inscription" theory, *supra* § I, this is no limitation. Summum offers no reason to believe the present factual scenario is not the norm, rather than the exception.

Summum claims the decision below is "limited" because it "applies only to privately-donated and unsolicited displays" where the monument is offered as a "completed product." Opp. at 17. This is hardly a limitation, as donated final-product monuments are extremely commonplace. *E.g.*, Pet. App. I. Nor is it at all "clear," Opp. at 17, that the rule of the Summum cases would not logically extend to monuments purchased from private entities. Under the Tenth Circuit's logic, Summum could assert a First Amendment "equal access" right to have the city purchase its monument if the city has purchased another private entity's "completed product." Indeed, Summum has already claimed, in the *Duchesne* litigation, a First Amendment right triggered by the

sale of parkland containing a monument.

Summum submits that the decision below would not limit the government when acting as "an educator" or "patron of the arts." Opp. at 17-18. But if this is so, the point merely highlights the illogic of the Tenth Circuit's reasoning. A city can be choosey when it accepts and displays "educational" items for a park, but not (as here) "historical" items? A city can freely select monuments to adorn an "art" park, but not (as here) a "Pioneer Park"?

Summum insists that the decision below applies "only to public parks and other . . . traditional public fora," Opp. at 18 (emphasis in original). That is indeed a very large "only." Furthermore, the Summum rule also subjects **nonpublic** fora to First Amendment forum analysis, as Summum concedes, Opp. at 18. While restrictions in such fora need only be "reasonable" and "viewpoint neutral," *id.*, the viewpoint-neutrality requirement alone would compel depiction of Benedict Arnold alongside George Washington, an Armenian Genocide memorial alongside a Holocaust memorial, and a "Wall of Shame" anti-war memorial alongside a "Wall of Honor" veterans memorial. States Br. at 9-10. The problem with the decision below is not just its imposition of strict scrutiny -- though that aggravates the situation -- but rather the core flaw of treating displays selected, owned, and controlled by the government as the speech of private ventriloquists, *cf. Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000).[4]

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[4]Summum speculates that "the effects of the decision below are likely to be limited to cases involving religious displays." Opp. at 16 n.4. But as Judge McConnell noted, "the religious nature of

III. SUMMUM'S OTHER REASONS FOR DENYING REVIEW LACK MERIT.

Summum's other contentions can be addressed briefly.

The fact that this case comes on appeal from a preliminary injunction is no obstacle to review. Pet. at 17 n.6. *See, e.g., New York State Bd. of Elecs. v. Lopez Torres*, 128 S. Ct. 791 (2008) (reviewing judgment on appeal from preliminary injunction). Moreover, the preliminary injunction here would force the city to erect Summum's permanent monument, giving Summum precisely the ultimate relief it seeks.

The Tenth Circuit's aberrant legal analysis is at this point well-defined and, in light of the denial of rehearing en banc, well-entrenched. The off chance that the case would end up turning on some other grounds on remand is no reason to deny review, leaving Tenth Circuit case law in its current disarray and leaving municipalities obligated to yield to all private requests to erect additional monuments -- or face copycat litigation for refusal to do so.

Summum denies the conflict in the circuits, but this denial rests entirely upon the false premises addressed above, that this case is "narrow and fact-bound" and that the key is the absence of a pre-

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the donated monument is not relevant to the free speech question," Pet. App. 10f-11f (dissent). Summum itself argued below that its right to erect its monument derived, not just from the city's display of the donated Ten Commandments monument, but also from the city's display of a thoroughly secular donated 9/11 Monument. Br. of Appellant at 21 (10th Cir. May 8, 2006). *See* Ex. F to Decl. of Frank Mills, *supra* p. 3 (photo of 9/11 Monument with inscription).

litigation, express "adoption" of the monument inscriptions. Opp. at 13, 23. *See also* Pet. App. 12f (McConnell, J., dissenting) (listing conflicting cases).

Summum also denies the grievous practical implications of the Summum cases for federal, state, and local management of properties containing donated monuments. Opp. at 31-33. But Summum's only argument is that beyond the all-or-none choice the decision below poses, Opp. at 11, 31 (option of banning all permanent displays), 29 (otherwise cannot discriminate among proposed monuments), *see* Amici Br. of Amer. Legion at 6 ("impossible choice"), a city can pursue express, formal, pre-litigation "adoption" of any inscription on the monument. As discussed *supra* § I, this "option" is neither constitutionally required, nor sensible, nor even a reliable defense under the Tenth Circuit's case law. Government bodies will not even be alerted to this supposedly necessary legal option, as it appears nowhere in the decision below.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

PLEASANT GROVE CITY, *et al.*,

Petitioners,

v.

SUMMUM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICI CURIAE OF THE AMERICAN LEGION; VETERANS OF FOREIGN WARS OF THE UNITED STATES; THE MILITARY ORDER OF THE PURPLE HEART, INC.; THE NON COMMISSIONED OFFICERS ASSOCIATION; VETERANS OF THE VIETNAM WAR, INC. & THE VETERANS COALITION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The American Legion – The American Legion is a veterans and community service organization representing over 2.6 million members. The American Legion helps veterans survive economic hardship and secure government benefits. It works to promote social stability and well-being for those that have honorably served our nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state and national veterans memorials. The proper resolution of this case is a matter of great concern to The American Legion because the ruling of the Tenth Circuit has a detrimental impact on its ability to honor with veterans memorials those who have and do serve our nation's armed forces.

Veterans of Foreign Wars of the United States ("VFW") – The VFW is a veterans service organization representing over 2.3 million members. The VFW was instrumental in establishing the Veterans Administration, creating a GI Bill for the 20th century and developing the national cemetery system. The VFW also fights for the compensation of Vietnam veterans exposed to Agent Orange and

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[1] All counsel of record received notice of *amici's* intention to file this brief at least ten days before this brief was due. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

veterans diagnosed with "Gulf War Undiagnosed Illnesses." The VFW helped fund the creation of the Vietnam Veterans Memorial, the Korean War Memorial, the World War II Memorial and the Women in Military Service Memorial. This case is of great concern to the VFW as it threatens the very veterans memorials the VFW helped create and directly threatens the erection of like veterans memorials in the future.

The Military Order of the Purple Heart, Inc. – The Military Order of the Purple Heart is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Purple Heart is a combat decoration awarded only those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is, as well, awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action. Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization composed strictly of combat veterans. As its work, the Order conducts welfare, rehabilitation and service work for hospitalized and needy veterans and their families. The Order is greatly concerned with the outcome of this case as it directly affects the future of veterans memorials that honor those who, like themselves, literally shed their blood in this nation's service.

The Non Commissioned Officers Association ("NCOA") – The NCOA is a veterans service organization established to enhance and maintain the quality of life for enlisted personnel in all branches of the Armed Forces, National Guard and Reserves. It advocates in the federal legislature on issues that affect enlisted personnel and their families. It provides social improvement programs to help enlisted personnel thrive on active duty, on transition to civilian life and throughout retirement. The NCOA also aids often underpaid enlisted personnel in saving money through merchant program discounts. As the vast majority of veterans are or were enlisted personnel, the NCOA is greatly concerned with the adverse affect a court decision that threatens veterans memorials will have on those it serves.

Veterans of the Vietnam War, Inc., & The Veterans Coalition ("VVnW") – The VVnW is an international veterans organization dedicated to assisting U.S. veterans of all wars and all branches of military service through its programs and services. It strives to maintain, improve, preserve and defend the quality of life of all veterans and their families. VVnW provides transitional housing to homeless veterans as they attempt to reintegrate into society, offers psychological and medical care to needy veterans, and works to educate the public about the debilitating effects of Post Traumatic Stress Disorder and Gulf War Syndrome. VVnW opposes any court ruling that threatens veterans memorials. Such rulings only add to the difficulties and struggles

already burdening so many veterans as a result of their military service.

SUMMARY OF ARGUMENT

The precedent established by the Tenth Circuit lays the foundation for the destruction of all donated veterans memorials nationwide and chills the erection of any future memorials. From the United States Marine Corps War Memorial in Arlington, VA, to the Vietnam Veterans War Memorial on The Mall in Washington, DC, to the myriad Spirit of the American Doughboy WWI memorials like that in Ft. Smith, AR, this precedent will require all governments, from the smallest municipality to the Congress itself, to make an impossible decision: either fail to honor our veterans by any donated monument whatsoever, tear down those that currently exist, or allow a monument honoring our veterans and then, upon donation, erect on the same hallowed ground one that dishonors them.

The Tenth Circuit's ruling is flawed in its legal analysis, as demonstrated by Petitioner, and dangerous to veterans memorials in its practical effect. Failure on the part of this Court to decidedly reverse the Tenth Circuit will cause great harm and enshrine its opinion in law. Amici, therefore, representing millions of veterans nationwide, request this Court secure and protect the future of our nation's veterans

memorials by granting Petitioners writ of certiorari and reversing the Tenth Circuit.

ARGUMENT

I. This case is important and the Court should grant the petition to save current and future veterans memorials from destruction.

The American Legion filed an amicus curiae brief in *McCreary County v. ACLU* (Case No. 03-1693) warning this Court that veterans memorials across the country would perish if guidance was not issued to protect them. Amici are dismayed to see this prediction become a stark reality in the Tenth Circuit with a precedent laid for the circuits remaining.

The Tenth Circuit concluded that a monument donated to a government entity by a private party remains the donor's private speech. *See Summum v. Pleasant Grove City*, 383 F.3d 1044, 1048 n.2 (10th Cir. 2007); *Summum v. Duchesne City*, 482 F.3d 1263, 1269, 1273-74 (10th Cir. 2007). It also concluded that the presence of a donated monument in a public area determines the area's forum and requires the acceptance of any other permanent monument, presumably until all green space has been filled. *See Pleasant Grove*, 383 F.3d at 1050 ("The permanent monuments in the city park therefore make up the relevant forum."); *Duchesne*, 383 F.3d at 1273-74.

This holding, flawed in its legal analysis, is devastating to veterans memorials. These memorials, erected to honor our veterans and the wars and battles in which they fought, account for a massive number of donated memorials erected in the public square. Under this precedent, any governmental entity, from the smallest municipality to the Congress itself, is presented an impossible choice: tear down its memorials donated to honor its veterans, requiring that none be erected in the future, or retain its memorials donated to honor its veterans and, upon request, accept and erect on the same grounds a monument donated to dishonor them.

The Tenth Circuit has authored a recipe for chaos. It has, as well, sealed the destruction of those privately donated veterans memorials within its jurisdiction and established a precedent that threatens those without. As Judge McConnell, joined by Judge Gorsuch, lamented in his dissent from the denial of rehearing, "[e]very park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter." *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting). Most towns and cities, out of necessity, will doubtless choose to tear down their veterans memorials rather than dishonor them or clutter their public areas.

Without appropriate action by this Court, then, the destruction of an untold number of veterans

memorials is sealed, and the rest fall deeper under the threatening shadow of a judiciary already proven hostile toward them. *See, e.g., Paulson v. Mt. Soledad Memorial Ass'n*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*) (enjoining as unconstitutional a veterans memorial in San Diego, Ca.); *Buono v. Kempthorne*, 364 F. Supp. 2d 1175 (C.D. Cal. Apr. 8, 2005) (affirmed by *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007)) (enjoining as unconstitutional a veterans memorial in the Mojave National Preserve).

A. Veterans memorials are a fundamental element of American history and military culture and record those virtues we hold dear as a people.

From the beginning, millions of Americans have given honorable service to this nation in its armed forces, often at cost of their lives. Beginning with the war against the Barbary Pirates of North Africa, the first formal war under our nation's Constitution,[2] this nation has commemorated the service and sacrifice of its veterans through privately donated memorials erected in the public square. Memorials to the

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[2] *See* The Tripoli Monument, United States Naval Academy, Annapolis, Md. The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search/ (enter the following into "Search" box: 75005835; then click "Tripoli Monument").

veterans of the War of 1812,[3] the Mexican War,[4] the Civil War,[5] the Spanish-American War,[6] World War I,[7] World War II,[8] the Korean War,[9] the Vietnam War[10] and the Gulf War[11] all bear witness to this. Following

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[3] *See, e.g.*, The Battle Monument in Baltimore, Md. The Historical Marker Database, www.hmdb.org (enter the following into "Search" box: battle monument Baltimore).

[4] *See, e.g.*, The Maryland Soldiers Monument of Baltimore, Md. The Descendants of Mexican War Veterans, www.dmwv.org/honoring/baltimore.htm.

[5] *See, e.g.*, The African American Civil War Memorial, Washington, D.C. The African American Civil War Memorial Freedom Foundation, www.afroamcivilwar.org (then click "The Memorial"); *see also* Telephone interview with representative of The African American Civil War Memorial Freedom Foundation, Washington, D.C., November 10, 2007.

[6] *See, e.g.*, The Spanish-American War Monument, Arlington National Cemetery, Arlington, Va. Arlington National Cemetery, www.arlingtoncemetery.org/visitor_information/Spanish-American_War.html.

[7] *See, e.g.*, The Spirit of the American Doughboy, erected in towns all across the United States. The Spirit of the American Doughboy, http://doughboy_lamp.tripod.com/id139.html.

[8] *See, e.g.*, The United States Marine Corps War Memorial, Arlington, Va. The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: VA000244; then click "The United States Marine Corps War Memorial").

[9] *See, e.g.*, The Korean War Memorial, Pittsburg, Penn., VFW Post 764, http://www.vfw764.org/koreanmem.htm.

[10] *See, e.g.*, The Vietnam Veterans Memorial, Washington, D.C., www.nps.gov/archive/vive/memorial/evolution.htm.

[11] *See, e.g.*, The Persian Gulf War Memorial Bust. The Smithsonian Institution Research Information System, http://

(Continued on following page)

each conflict, following each time we called upon our own to serve and to die, there arose afterward an instinctive need to commemorate that service in a very public and permanent manner. The result unwaveringly has been a lasting memorial of wood or stone or metal erected to honor and remember those who served and those who died.

Our veterans memorials have become ingrained in our national identity as deeply as any part of our culture could. When one thinks of Iwo Jima, among the first images that come to mind is that of five Marines and a Navy corpsman, battle weary and ragged, struggling to hoist the Colors atop a craggy, body strewn Mt. Suribachi, an image captured in bronze and black granite in a park in Arlington, Virginia. Thoughts of Vietnam unwaveringly turn to a long, spare granite wall standing on The Mall in Washington, D.C., a stark and unchanging roster of those who died in that war. In numerous towns and cities across our nation, World War I is forever tied to their own Spirit of the American Doughboy – life-size sculptures of a lone uniformed soldier of the Great War with arm raised, determinably striding forward. For many black Americans, reflections on the Civil War bring to mind the African American Civil War Memorial, the only national memorial to the black

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siris-collections.si.edu/search (enter the following into "Search" box: NY001479; then click "Persian Gulf War Memorial Bust").

veterans of the war in which the freedom of an entire people was won.

These memorials, honoring the dead and encouraging the living, use words like courage, valor, sacrifice, loyalty, bravery, faithfulness, hope, love, duty and honor. They record events and persons in which these virtues were seen and lived. They provide unchanging examples to young and old alike of what is good and right and honorable. They record the very history of this nation in metal and stone, providing those who view them yet another reason to be thankful for the land in which they find themselves and the Constitution under which they are governed.

Our veterans memorials are a living testimony to our very identity as a nation and as a people. Nothing more defines a nation than those times and causes it has considered worthy of the blood of its sons and daughters. These memorials commemorate those times and causes and the people who fought and bled for them and fight and bleed for them still. This case presents important questions, and if they remain unanswered, veterans memorials will perish.

II. Allowing the destruction of any veterans memorial is a dishonor and betrayal toward all who have served and those serving even now.

Consider the veterans memorials described in Section I-A, *supra*. While varied in form and effect, and erected in commemoration of different people

from different eras, all share two things in common: they stand in public parks in honor and remembrance of veterans from their respective wars, and they were donated by private parties for permanent display in the public square.[12]

Accordingly, the Tenth Circuit's analysis of the Constitution requires that upon donation and alongside the Iwo Jima memorial, a monument to the benevolence of the prison guards of the Bataan Death March be erected, as well as one to the meritorious contributions of the kamikaze. Upon donation, per

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[12] The United States Marine Corps Memorial (i.e., the Iwo Jima monument), located in a public park in Arlington, Va., was donated by individual Marines and friends of the Marine Corp. *See* The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: VA000244; then click "The United States Marine Corps War Memorial"). The Vietnam Veterans Memorial (i.e., The Wall), erected on The Mall in Washington, D.C., was donated by contributions from more than 275,000 individuals. *See* The Vietnam Veterans Memorial, Washington, D.C., www.nps.gov/archive/vive/memorial/evolution.htm. A great number of Doughboys erected in public parks across the country were donated to their respective towns by private organizations and civic groups. *See* http://members.tripod.com/doughboy_lamp/earlspages/id63.html (click on Anniston, AL, Birmingham, AL, Ft. Smith, AR, etc.). And the African American Civil War Memorial, erected in a public plaza in the heart of Washington, D.C.'s Shaw neighborhood, was donated through private contributions to the Freedom Foundation of the same name. *See* The African American Civil War Memorial Freedom Foundation, www.afroamcivilwar.org (then click "The Memorial"); *see also* Telephone interview with representative of The African American Civil War Memorial Freedom Foundation, Washington, D.C., November 10, 2007.

the Tenth Circuit, it is only constitutional that a large bust of Ho Chi Minh, renowned purveyor of democratic principles and human rights, be placed on The Mall along with the Vietnam Veterans War Memorial. Upon donation, the towns across the country with World War I Doughboys must also erect a monument donated to honor the leaders of the Central Powers. And the Tenth Circuit would find that acceptance of the donated African American Civil War Memorial requires acceptance of a donated alabaster sculpture of a hooded man in white robes bearing the title of grand dragon.

Battery Park on Manhattan Island, New York, is replete with donated memorials, veterans and otherwise. It is also the current home of The Sphere and Eternal Flame, memorials to the fallen of September 11, 2001. According to the Tenth Circuit, the people of New York should also be required to accept and erect, upon the same ground, a monument donated to extol the virtues of al-Qaida and the vision of its leaders.

Likewise the U.S. Soldiers Monument in Shelby, Michigan,[13] the Spanish-American War Monument in Arlington National Cemetery,[14] the Maryland Soldiers

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[13] *See* The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: MI000301; then click "U.S. Soldiers Monument").

[14] *See* Arlington National Cemetery, www.arlingtoncemetery.org/visitor_information/Spanish-American_War.html.

Monument in Baltimore, Maryland,[15] the countless veterans memorials donated and erected in the public squares of countless towns by The American Legion, Veterans of Foreign Wars, the Fraternal Order of Eagles, etc. – even the Statue of Liberty in New York Harbor – all are privately donated memorials erected in the public square. According to the Tenth Circuit, each of the areas housing these memorials could now be considered public fora in which any donated monument espousing protected speech can and must be displayed regardless of viewpoint.

Exploration and intellectual analysis of the bounds of our rights and liberties under the Constitution is good and necessary. Without it, our rights and liberties would stagnate. The implications of this ruling, however, are astounding: if some are honored, their dishonor must be permitted as well. And all must be honored or none may be honored. This, of course, defeats the very purpose for the act of *honoring*, which is to set apart as special and worthy of consideration a particular person or act or idea. If all must be similarly set apart, then the act of honoring loses its meaning. The Court should grant the petition to preserve veterans memorials now and for the future.

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[15] *See* The Descendants of Mexican War Veterans, www.dmwv.org/honoring/baltimore.htm.

III. America's veterans memorials, honoring the service and sacrifice of millions, must be preserved.

The destruction and chilling of our veterans memorials is not a viable option. What effect would the court sanctioned destruction of veterans memorials do to the soldier who even now is patrolling the streets of Baghdad with death at every street corner and behind every door? What would a headline like "Court strikes down veterans memorials" do to the legless Marine in Walter Reed struggling to make sense of his injuries and put his life back together? What would it mean to the homeless veteran on the streets of Chicago? What effect would it have on the remaining veterans who survived Pearl Harbor and suffer nightmares even now?

Our veterans memorials serve as unchanging reminders of who we are as a nation and where we have been. How else should this be done? In forgotten books gathering dust on hidden shelves of forgotten libraries? In motion pictures once watched and put on the shelf and out of mind? Public memorials are among the most powerful tools of remembrance available to the modern world. Each time we see them, our veterans memorials force us to remember, if only fleetingly and only for an instant, that there were those who held the line, that there were those who answered the call, that there were those who rose to the task at peril of their lives to give themselves to something they deemed worthy of their life. They force us to remember that the security and

prosperity of this nation did not come without a price, both high and dear, and that its birth and continued survival has been hard fought and hard won.

Our veterans memorials force us to remember. If we fail to remember, we forget. And if we forget the men and the women and the struggles and the virtues our veterans memorials commemorate, what does that say about us as a people? And what effect will it have in the future when we call on our own to don the uniform once more and go in harm's way? The Court should grant the petition to preserve ou veterans memorials, which stand the most to lose in the wake of the Tenth Circuit's ruling.

IV. Veterans memorials donated to the government for display is government speech.

Veterans organizations, the typical private donors of veterans memorials, do not seek to speak on their own behalf when donating a veterans memorial. Instead, organizations such as amici intend to assist and support the government's role of honoring those who served our nation so well. The government never turns a blind eye during the donation process. On the contrary, government officials are very involved in the development and design of the memorials and must approve the dimensions, design and content of the memorial. This very selection of memorials for the governmental display is itself the exercise of governmental authority, and the government ultimately takes ownership and control of the memorial donated

by the organization. *See, e.g.*, *United States v. American Library Ass'n*, 539 U.S. 194, 208 (2003) (plurality); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998).

Veterans take an oath upon entering service to uphold the Constitution of the United States. It is the obligation of the United States and their political subdivisions to honor the sacrifice of those who preserved them. Veterans organizations and individuals simply assist the government in fulfilling its role, its duty, to honor those who preserved our freedom and our nation. Thus, the thousands and thousands of veterans memorials across the country, found in almost every city or county, are properly viewed as government speech for the purpose of honoring the sacrifice of those who preserved us a nation.

CONCLUSION

This Court should preserve our nation's veterans memorials by granting the writ of certiorari and reversing the Tenth Circuit. Millions of veterans, represented by amici, implore it to do so. This Court may, without question, choose another course. It has the power to allow the Tenth Circuit's ruling to stand and thus the veterans memorials to fall. But if it

does, if after repeated warnings[16] and in the face of certain destruction this Court again fails to render our veterans memorials the protection they deserve, this nation will walk that course with heads bowed, not in reverence, but in disgrace, ingratitude and shame. The Petition should be granted.

Respectfully submitted,

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[16] The American Legion filed an *amicus curiae* brief in *McCreary County v. ACLU* (Case No. 03-1693) warning this Court that veterans memorials across the country would perish if guidance was not issued to protect them. *See also Paulson v. Mt. Soledad Memorial Ass'n*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*) (enjoining as unconstitutional a veterans memorial in San Diego, Ca.); *Buono v. Kempthorne*, 364 F. Supp. 2d 1175 (C.D. Cal. Apr. 8, 2005) (affirmed by *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007)) (enjoining as unconstitutional a veterans memorial in the Mojave National Preserve).

AMICUS CURIAE BRIEF

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No. 07-665

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In The
Supreme Court of the United States

PLEASANT GROVE CITY, et al.,

Petitioners,

v.

SUMMUM,

Respondent.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTIONS PRESENTED

The amici adopt the questions as presented by the Petitioners.

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INTEREST OF THE AMICI[1]

The amici curiae request that this Court grant review and reverse the decision below because each amicus confronts the unnecessary and undesirable results that follow from the Tenth Circuit's over-extension of this Court's public forum doctrine. Each has incorporated works donated by private citizens into their governmental display of work designed to serve the needs and aspirations of their community. As a result of the decision below, each city will now be forced to choose between removing those works the city has accepted and displayed to promote its lawful governmental objectives or allowing public places to serve as the forum for anyone and any permanent message.

Casper, Wyoming, is a city of approximately fifty thousand people, located in the Rocky Mountains in the middle of the State of Wyoming. The decision below places the City of Casper in a terrible dilemma which follows from two facts. The first is that the City accepted a Ten Commandments Monument donated by the Fraternal Order of Eagles in 1965. The second is that Casper is the birthplace and

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

resting-place of Matthew K. Shepard. In a way that neither this Court nor the City of Caspar could ever have imagined, these two simple facts have converged to make Casper Wyoming a perfect example of the harm caused by the decision below.

The Casper City Council dedicated an Historical Monument Plaza on July 16, 2007. The City's Historical Monument Park consists of stone monuments depicting the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Preamble to the United States Constitution, the Bill of Rights, and the Ten Commandments, along with plaques describing the historical significance of these documents. The City controls the park and determines what monuments may be placed there. But the City's Monument Park includes a Ten Commandments monument donated to the City by the Fraternal Order of Eagles in 1965.

The decisions rendered by the Tenth Circuit in *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) and *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007) place the City in terrible position for the following reason. When the City's plan to create its Historic Monument Park was announced, Fred Phelps, pastor of the Westboro Baptist Church, demanded the right, under Tenth Circuit's decision in *Summum v. City of Ogden* 297 F.3d 995 (10th Cir. 2002), to place a Matthew Shepard Monument in City Park.

The so-called Shepard Monument would read as follows:

> MATTHEW SHEPARD Entered Hell October 12, 1998, in Defiance of God's Warning 'thou shalt not lie with mankind as with womankind; it is abomination.' Leviticus 18:22.

The City refused Pastor Phelp's request.

But now the City confronts a dilemma. Does the fact that the City of Casper incorporated the Ten Commandments Monument donated by the Eagles into the City's Historic Monument Park mean that the City must incorporate Pastor Phelp's so-called Matthew Shepard Monument? The City dreads the answer for reasons any person who values civility can easily understand.

In essence, under the *Summum* decisions, any governmental entity faces either converting its public spaces to graveyards of monuments to whatever cause may be proffered by citizens for any motive (base or noble), or to otherwise remove all such monuments, including war memorials and other commemorative plaques from its public forums at an extreme cost and expense, not to mention the cost of removing engravings from buildings, cornerstones, etc., which literally ingrain our country's heritage and history into our public spaces.

The City of Casper believes it should not be forced to install the Matthew Shepard Monument at the demand of the Westboro Baptist Church because

it chose to accept and display as its own a work donated by another private organization over forty years ago. The City's Monument Park is a display by the people of the City of Casper, acting through their elected representatives; it is not a forum for permanent speech by private parties.

The City of Santa Fé, New Mexico, provides another example of the harm caused by the decision below much broader than the particular (and more egregious) harm suffered by the City of Casper. La Villa Real de la Santa Fé de San Francisco de Asis (Santa Fé) was founded in 1610 and is world-renowned for its long history and its eponymous trail, railroad, and architectural style. Santa Fé celebrates these glories with permanent monuments and sculptures in its parks. Many of the monuments and works of art were donated by private parties, accepted by the City, and proudly displayed in its public spaces for the reason just described. The decision below, if allowed to stand, will force the City to choose between denuding its public spaces of artwork reflecting its history and culture or allowing those public spaces to be inundated with hundreds of permanent displays furthering private expression. The City of Santa Fé believes it should not be forced to choose between stripping its public spaces of art donated by private parties or placing its public spaces at the disposal of private citizens.

The City of Ogden, Utah, shows the adverse impact of the decision below and the prior decisions of the Tenth Circuit in the Summum cases. It too accepted a Ten Commandments monument from the

Fraternal Order of the Eagles. When Summum sued the city arguing that acceptance and display of that monument created a public forum, the Tenth Circuit agreed in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002). Confronted with the implications of the Tenth Circuit's decision, *i.e.*, opening its public spaces to permanent monuments placed by any citizen for any reason, the City removed the work.

For these reasons, explained further below, the amici request that the Court grant the petition for certiorari and, in due course, reverse the decision below.

REASONS FOR GRANTING THE PETITION

As an initial matter, the amici curiae state their agreement with the Petitioners before the Court as well as the dissenters below insofar as they argue that neither precedent nor common sense recommend the conclusion that public parks are traditional public forums for the purpose of private speech communicated by means of a *permanent display*. The dissenters below fully explain why this Court's decisions do not support the notion that traditional public forums have traditionally been forums for *private* speech communicated by means of *permanent* display. The Petitioners highlight the way in which this ahistorical assertion conflicts with sister-circuits that have rejected this unwarranted extension of public forum doctrine as well as the farfetched notion that *governmental* display of monuments donated by private

parties can be realistically characterized as *private* speech.

The amici write to emphasize a distinct but related way in which the decision below is inconsistent with the decisions of this Court. More specifically, the amici write to make explicit the way in which the decision below relied upon the two erroneous conclusions noted above, to justify a third "ultimate conclusion," *i.e.*, the conclusion that the *government's* acceptance and display of works donated by *private* parties, requires the finding that the government has created a forum for *permanent* display by *private* citizens.

In this way, the decision below creates what amounts to an imputed intent to *expand* a traditional public forum to include *permanent display by private citizens* based on nothing more than the decision by a governmental body to accept and display a work donated by a private citizen. Such a finding of governmental intent based on nothing more than the display of works donated by private parties is wholly inconsistent with legal principles that this Court has developed to determine when action by government officials is sufficient to support a finding that the government has intentionally opened a public forum. And such an extension of this Court's decisions is plainly undesirable because it undercuts the ability of government to engage in speech that is designed to serve the community's needs or aspirations.

I. The Decision Below Represents An Unthinking Over-Extension Of This Court's Forum Doctrine That Has Highly Undesirable Consequences For Civic Life.

Traditional public fora *have not been traditionally regarded as fora for permanent speech by private citizens*. Thus it is clear that the decision below represents an extension of this Court's precedent – an implicit finding that the Petitioners intended to *expand* traditional public forums to make them serve as forums for *permanent* speech by private citizens. Precisely because the decision below really turns on this implicit finding of intent to expand a traditional public forum, it is plain that the most relevant precedent from this Court is provided by cases concerning the kind of government action that *designates* public property that is *a nontraditional forum* as a public forum nonetheless. As demonstrated below, this Court's decisions have uniformly emphasized that an intent-to-create a forum should only be found where the undisputed facts provide clear evidence of such intent. Because there is no basis for such a finding of intent to open (or, in this case, expand) a forum here, it is clear that the decision below arises from an unjustified extension of this Court's prior decisions that should be rejected.

Early on, this Court rejected the claims that public property was necessarily a forum for even *temporary* speech by *private* citizens recognizing that "were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military

compounds and other facilities would immediately become Hyde Parks open to every would-be pamphleteer and politician. This the constitution does not require." *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 435 U.S. 114, 130 n. 6 (1981).

In the same vein, this Court has noted that "forum analysis is not completed merely by identifying the property at issue. Rather, in defining the forum we have focused on the *access sought by the speaker*." *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 801 (1985). Emphasizing that "government does not create a public forum by inaction . . . but only by intentionally opening a nontraditional forum for public discourse," the Court refused to find that the Combined Federal Campaign was a public forum, even though the campaign had been opened to a variety of speakers, because "the Court has examined the nature of the property and its compatibility with expressive activity to discern the government's intent." *Id.* at 803 (relying on numerous cases where the *government's control of access* to the forum had led the Court to negate claims for *access*) (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Greer v. Spock*, 424 U.S. 828 (1976); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)).

Likewise, in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), this Court rejected a claim that a student newspaper was a public forum, even though students were allowed to express a great

many views therein. In so doing it stated that "[i]f the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created. . . ." *Id.* at 267. Relying on evidence of ongoing government control over the student newspaper, the Court found that the evidence that students had some ability to express their views could not support a finding that the school had created a public forum in the school newspaper.

Similarly in *Arkansas Educ. Tele. v. Forbes*, 523 U.S. 666, 672-73 (1998), this Court declined to find that public television was a public forum. In so doing, the Court reasoned that "[h]aving first arisen in the context of streets and parks, the public forum should not be extended in a mechanical way to the very different context of public television." But once the superficial (and ahistorical) view of traditional public forums advanced by the decision below is set aside, it is clear that the Tenth Circuit's claim that traditional public forums are forums for *permanent speech by private citizens*, rests largely on just such a mechanical extension of traditional public forum doctrine.

The decision below points to nothing that might suggest that government relinquished control over placement of *permanent* displays in either of the parks at issue here. This brings into focus the heart of the decision below – an implicit finding of a government *intent to expand a traditional forum* to make it one for *permanent speech by private citizens* based

on nothing more than the *government's* display of a *work* donated by a private party.

The amici respectfully submit that this Court has never found an intent to create (in this case *expand*) a forum based on such slim indicia. Indeed, such a finding is directly at odds with this Court's longstanding approach whereby the "government does not create a public forum by inaction or by permitting limited discourse but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. Such a finding is also at odds with experience, for there is no question that governmental entities have always exercised control over *permanent* display in public parks and other public spaces.

The opinion written separately by Judge Tacha in response to the dissenters below demonstrates the importance of the forum determination (and related over-extension) of this Court's precedent – emphasized here. In her response to the dissenting opinions, Judge Tacha first cites decisions concerning the placement of *private property* in a public forum. *See* 499 F.3d 1170, 1178 (10th Cir. 2007) (opinion by Tacha, J.), (*citing City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (dealing with news racks), and *Capitol Square Review & Advisory Board. v. Pinette*, 515 U.S. 753 (1995) (cross owned by private organization). She then relies on cases *rejecting* claims that *private* parties required to support government speech are being forced to engage in *private* speech that agrees with the government (on the

theory that regulatory exactions used to support *government* speech amount to coerced *private* speech). *Id.* at 1180 (*citing Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005)). Based on these cases, and this Court's "focus on whether the message is the government's own," Judge Tacha asserts that a "city's control over a physical monument does not therefore transform the message inscribed on the monument into city speech. If this were true, the government could accept any private message as its own without subjecting the message to the political process, a result that would shield government from First Amendment scrutiny and democratic accountability." *Id.* at 1180.

Judge Tacha's arguments are not supported by the precedent cited, do not withstand scrutiny, and amount to a dangerous extension of this Court's precedent. None of the cases cited by Judge Tacha require a finding that a traditional public forum is a forum for *permanent* display (speech) by *private* citizens. None of the cases relied upon by Judge Tacha require a finding that the *government's* display of works donated by private parties must, by operation of law, be deemed *private* (as opposed to government) speech. The claim that the *government's* display of a work donated by private parties must be considered *private* speech simply begs the question – why would anyone reach that conclusion? And Judge Tacha's rationale for the extension of precedent (*i.e.*, the notion that if governmental display of works donated by private citizens is treated as government speech, the matter is somehow exempted from the political process), simply defies

reason; given that elected officials make these decisions, how can those decisions be regarded as exempt from the political process?

Judge Tacha offers a telling illustration in support of the decision below. She seeks to justify the decision on the grounds that treating governmental display of works donated by private parties as government speech must be wrong because this would mean that each book placed in a public library would become government speech (*e.g.*, *The Great Gatsby*). *See Summum v. Pleasant Grove City*, 499 F.3d at 1179. Here it suffices to say that the result Judge Tacha believes compelled by this Court's precedent is, in fact, directly contrary to the commonsense approach taken by this Court, which has reached its conclusions based on a realistic appraisal of the totality of the circumstances, something Judge Tacha acknowledges in her own opinion when referring to "a different line of cases recognizing the government's ability to make content-based judgments when it acts in particular roles (*e.g.*, educator, librarian, broadcaster, and patron of the arts)." *Id.* at 1179-80 & n. 2. The amici respectfully suggest that decision below is critically flawed precisely because it fails to engage in a realistic appraisal of the situation presented by the *government's* acceptance and *display* of works donated by private parties. As a result, it fails to acknowledge that the *government's* display of works donated by private parties simply represents another way in which *government speaks* rather than a way in which government demonstrates an intent to open a forum.

The predicaments faced by the City of Santa Fé, New Mexico, the City of Casper, Wyoming, and the City of Ogden, Utah, demonstrate the intolerable consequences that flow from the decision below. The people of Santa Fé, acting through their elected representatives, endeavor to celebrate their rich and diverse history by placing representative works of art in public places. Many of those works have been donated by private parties. As a result of the decision below, the city now faces the prospect of being forced to display works upon demand by anyone, regardless of whether elected officials believe that those works enrich the community.

The predicament faced by the City of Casper, Wyoming, is egregious. The city endeavors to promote civic virtue by directing attention to fundamental sources of our national heritage. Now it faces the very real prospect of being forced to display a monument condemning one of its inhabitants to Hell simply because in 1965, the city accepted a monument that has been incorporated into a display designed by the City to serve a legitimate civic purpose.

The City of Ogden, Utah, has already confronted the pernicious consequences of the Tenth Circuit's *Summum* decisions. Faced with the choice of opening its public spaces to permanent display by anyone, the city made what it regarded as the only acceptable choice under the circumstances. It removed the monument donated by the Eagles. But it believes this choice is unnecessary and undesirable.

These undesirable consequences are not required by this Supreme Court's decisions. Quite the contrary, they follow only from an ahistorical view of public fora and an unthinking extension of this Court's precedent. The decision below leaves this Court no choice but to make plain the limits that common sense places upon its prior decisions. The amici urge this Court to seize this opportunity before the consequences of the decision below begin to be suffered by their cities and others as well.

Early on in the development of this Court's forum case-law this Court rejected an "attempt to build a public forum with his own hands." *Perry*, 460 U.S. at 50 n. 9. The decision below represents a similar effort to "build a public forum" for *permanent* speech by *private* citizens based on nothing more than the *government's* display of works donated by private citizens in a traditional public forum. That result is an unwarranted and undesirable extension of this Supreme Court's decisions. For the reasons explained above, the amici respectfully submit that the decision below relies upon evidence and reasoning that is wholly insufficient to find an intent to create a forum for *permanent* speech by *private* citizens. For these reasons (as well as those advanced by the dissenters below and the Petitioners here), the amici respectfully request that this Supreme Court grant the petition for writ of certiorari and, in due course, reverse the decision below.

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v.

SUMMUM, a corporate sole and church,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, EIGHT OTHER STATES, AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

The States' Amici Brief in support of the Petition addresses the following questions:

1. When government accepts a donation of property and then uses the property for expressive purposes, is the expression considered government speech?

2. If government accepts a donation of property and then installs that property in a public park, does the government create a public forum for the installation of structures?

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INTEREST OF AMICI[1]

The States' interest is clear – preserving the sovereign authority of the States and their political subdivisions to engage in *government* speech. If it is inevitable that government will "adopt and pursue programs" that "are contrary to the profound beliefs and sincere convictions of some of its citizens," it is equally "inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Board of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229 (2000). When the government speaks, "different principles" control. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 834 (1995). Government speech takes many forms including defense of its own "values," *Rust v. Sullivan*, 500 U.S. 173, 194 (1991), determinations of excellence, *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998), and a public library's "traditional role in identifying suitable and worthwhile material," *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 208 (2003). Although most government speech will involve the expenditure of public funds, there are instances when government speaks by accepting a donation of personal, real, or intellectual property from private interests and then using that property to perpetuate the government's message. The use of property for

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file.

government expression is constitutionally indistinguishable from the use of public funds for government expression. If government can spend money to purchase newspaper and radio advertisements saying "immunize your child," government can accept a donation of a privately financed billboard that reads "immunize your child." Moreover, having advocated the message of childhood immunization, government can refuse the donation of a billboard that says, "immunization is a government conspiracy."

The Tenth Circuit's decision ignores these fundamental principles of government speech. It limits the ability of government – at all levels – to use or decline donated property as a means of government expression.[2] Under the lower court's reasoning, if government accepts a donation of property as a means of facilitating its own expression, it must accept all similar donations – even though the other donations convey a message that is tangential or even contradictory to the message that government wishes to convey. As Judge McConnell noted, governments "must either remove the war memorials or brace themselves for an influx of clutter." *Pet. App.* 10f (McConnell, J., joined by Gorsuch, J., dissenting from the denial of rehearing *en banc*.).

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[2] Presumably, the same rationale would apply if the donor sold the property to the government for less than fair market value. Thus, the rule cannot be avoided by selling the property for some nominal amount.

The Constitution does not compel such a result. To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it advances its own agenda "would render numerous Government programs constitutionally suspect." *Rust*, 500 U.S. at 194. "Consequently, the Government may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen."[3] *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1048-49 (2nd Cir. 1988). "If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee." *PETA v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005).

REASONS FOR GRANTING THE PETITION

The Petition should be granted for three reasons. First, there is a conflict among the Circuits. Second, the decision below undermines the States' ability to engage in government speech. Third, the Tenth Circuit's decision has implications far beyond the public parks.

[3] *See also Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (State may express official view of state history, but may not force individuals to do so.); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973) (act forbidding federal employees from engaging in political activity does not violate First Amendment).

I. THERE IS A CONFLICT AMONG THE CIRCUITS.

The Tenth Circuit decision conflicts with the decisions of other Circuits in two ways. First, the Circuits are divided on whether a donation of property results in government speech or private speech by the donor. Second, the Circuits are divided on whether public parks are a public forum for the erection of monuments.

A. The Circuits Are Divided on Whether a Donation of Property Results in Government Speech or Private Speech by the Donor.

The Circuits are divided on whether a donation of property results in government speech or private speech by the donor. In the Tenth Circuit, when government accepts a donation of property, any speech that subsequently results is speech by the private donor, not speech by the government. *Pet. App.* 3a n.2.[4] Moreover, if multiple donors wish to convey property, government has no discretion to accept or reject particular pieces of property.

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[4] *See also Summum v. Duchesne City*, 482 F.3d 1263, 1269, 1273-74 (10th Cir. 2007), *petition for cert. filed* (U.S. Nov. 21, 2007) (No. 07-690); *Summum v. City of Ogden*, 297 F.3d 995, 1003-06 (10th Cir. 2002); *Summum v. Callaghan*, 130 F.3d 906, 919 & n.19 (10th Cir. 1997).

In sharp contrast, other Circuits have concluded that, when government accepts a donation of property, any speech that subsequently results is government speech. *See ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 774, 778 (8th Cir. 2005) (*en banc*) (implicitly assuming that a city's acceptance of a privately donated monument in public park resulted in government speech). When property is transferred from a private party to the government, "the effect of formal transfer of legal title to property [is] a transfer of imputed expression. . . ." *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). If a work of art "is entirely owned by the Government and is displayed on Government property," "the speaker is the . . . Government." *Serra*, 847 U.S. at 1049. Similarly, a religious display "owned and displayed by city government on city government property" is "government speech." *ACLU v. Schundler*, 104 F.3d 1435, 1444 (3rd Cir. 1997). Furthermore, when government chooses to accept some donations, but to reject others, it is engaging in government speech. *PETA*, 414 F.3d at 28-29. Thus, in the D.C. Circuit, the government may choose which privately donated sculptures to install in a public park. *Id.* at 29.

B. The Circuits Are Divided on Whether Public Parks Are a Public Forum for the Erection of Monuments.

The Circuits also are divided on whether public parks are a public forum for the erection of monuments. The Tenth Circuit found that, by allowing the erection of a single monument in a public park, the government creates a public forum for the erection of monuments. *Pet. App.* 9a-11a. Thus, unless the government bans "all permanent displays," *Pet. App.* 18a, it must allo private parties to erect monuments whenever they wish.

Other Circuits have reached the opposite conclusion. *See Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2nd Cir. 1989) (Local government is not required to display a privately funded menorah in a public park.). "There is no private constitutional right to erect a structure on public property." *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) (*en banc*). "If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures." *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990). "Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved." *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005).

II. THE DECISION BELOW UNDERMINES THE STATES' ABILITY TO ENGAGE IN GOVERNMENT SPEECH.

Even if there were not a clear, deep, and mature conflict among the Circuits, review by this Court would still be warranted to correct the Tenth Circuit. The decision below undermines the States' ability to engage in government speech.

There is a fundamental difference between private speech that utilizes government resources such as property or money and government speech that advances the government agenda. *Finley*, 524 U.S. at 586. If government makes its property or funds available for private expression, the First Amendment prohibits viewpoint discrimination. *See Rosenberger*, 515 U.S. at 837 (public funds for student groups); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386 (1993) (use of a publicly owned auditorium).[5] In contrast, the expenditure of public funds for government speech generally does not implicate the First Amendment. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005). "Simply because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist."

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[5] *Cf. Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148 n.1 (1946) (Second class mailing privileges available to all newspapers and other periodicals).

Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000).

The decision below blurs the fundamental distinction between private speech using government resources and government speech. First, under the reasoning of the court of appeals, *all* donations of property to the government that result in expression are considered *private* speech and, thus, implicate the First Amendment. As a practical matter, a particular of government speech – accepting a donation of property and then using that property to convey the government's message – has been abolished. Although government may still pursue other modes of communication, the closure of one mode makes the government expression more difficult.

Second, under the reasoning below, if donated property is erected in a public park, that park is transformed into a public forum where other private parties may erect donated property with expressive attributes. As a practical matter, this means that government can no longer use its own parks to convey its message. While government remains free to speak in other places, the loss of the public park as a venue for government speech makes communication more difficult.

Furthermore, while government speech is inhibited by the Tenth Circuit's decision, there is no reason to believe that private speech will be expanded. As a practical matter, government will respond to the decision by refusing to accept

donations of property. Moreover, faced with a choice of allowing all monuments in public parks or allowing none, many – if not most – governments will opt for none. Thus, the long-term effect of the decision may well be to inhibit private speech. Surely, the Constitution does not require a result that inhibits government speech while not promoting – and possibly undermining – private speech.

III. THE DECISION BELOW HAS SIGNIFICANT IMPLICATIONS BEYOND PUBLIC PARKS.

The implications of the lower court's decision for public parks are obvious. George Washington must stand near Benedict Arnold. Union Generals must be accompanied by their Confederate counterparts. A Holocaust Memorial must be alongside a monument to the Ottoman Empire's Armenian Genocide or the British atrocities during the Boer War, or, for that matter, a monument to honor Adolf Hitler. The applications to public parks alone are sufficient to warrant this Court's review.

Yet, nothing in the Tenth Circuit's opinion limits its rationale to public parks. Its logic extends to any governmental decision that involves the acceptance of property where some form of expression results. Most obviously, the decision applies to government's decisions regarding the contents and décor of government buildings. Since Virginia's Pocahontas

State Office Building[6] contains a privately funded "Wall of Honor" commemorating those Virginians who have died in the War on Terror, it must also include a "Wall of Shame" protesting the War or celebrating the supposed virtues of the Terrorists.[7] Although South Dakota's Capitol Rotunda contains privately donated sculptures of Wisdom, Vision, Courage, and Integrity, the Tenth Circuit would mandate inclusion of other sculptures honoring Stupidity, Cowardice, and Dishonesty.[8]

Less obviously, the mandate extends to all decisions where government accepts property and some sort of expression results. Thus, if a public museum accepts a donation of a painting, it must accept all donations of paintings – even if it regards a painting as inferior art, distasteful, or simply inappropriate for the museum's overall purpose. Similarly, if a public university library accepts a donation of a book, it must accept all donations of books. *Cf. Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871-72 (1982) (libraries have broad discretion in determining what books to add to their collections). Conceivably, acceptance of a private party donation of laboratory

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[6] Virginia names its State Office Buildings after prominent Virginians including Jefferson, Madison, and Monroe.

[7] For a description of the "Wall of Honor," see http://www.vaag.com/PRESS_RELEASES/NewsArchive/052407_Wall.html.

[8] For information and images of the sculptures, see http://www.state.sd.us/state/capitol/capitol/tour/bronze.htm.

equipment, computers, or curricular materials means that the government may never refuse a donation. In time, government will be overwhelmed with mediocre art, unwanted books, and useless equipment. The only way for the government to avoid becoming a "pack rat" is to refuse all donations of art and books.

CONCLUSION

For the reasons stated above, in the Petition itself, and in the other amici briefs supporting the Petitioners, the Petition for Certiorari should be **GRANTED**.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 07-665

IN THE
Supreme Court of the United States

PLEASANT GROVE CITY, ET AL.,
Petitioners,

v.

SUMMUM, a corporate sole and church,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 20, 2007
CERTIORARI GRANTED MARCH 31, 2008

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Date Filed	#	Docket Text
07/29/2005	1	COMPLAINT against Darold McDade, Jeff Wilson, Carol Harmer, G. Keith Corry, Frank Mills, Pleasant Grove City, Jim Danklef, Mark Atwood, Cindy Boyd, Mike Daniels (Filing fee $250, receipt number 4681005386), filed by Summum. Assigned to Judge Dee Benson (rlr,) (Entered: 07/29/2005)
***		
09/01/2005	4	ANSWER to Complaint filed by Pleasant Grove City. (kvs,) (Entered: 09/01/2005)
***		
10/03/2005	6	ANSWER to Complaint filed by Jim Danklef. (jmr) (Entered: 10/05/2005)
***		

10/12/2005	8	AMENDED ANSWER to 1 Complaint, filed by Defendant Jim Danklef. (Attachments: # 1 Index of Exhibits # 2 Exhibit 1 # 3 Exhibit 2 # 4 Exhibit 3) (White, Edward) (Entered: 10/12/2005)
10/14/2005	9	MOTION FOR Partial Summary Judgment filed by Plaintiff Summum. (asp,) (Entered: 10/17/2005)
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10/19/2005	13	MOTION for Judgment on the Pleadings re: affirmative defenses filed by Plaintiff Summum. (asp,) (Entered: 10/20/2005)
10/19/2005	14	MEMORANDUM in Support re 13 MOTION for Judgment on the Pleadings filed by Plaintiff Summum. (asp,) (Entered: 10/20/2005)
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***		
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02/02/2006		Minute Entry for proceedings held before Judge Dee Benson: Cnsl present. After arguments were heard and discussion held, Crt ruled: denying 9 Motion for Partial Summary Judgment, denying 10 Motion for TRO, denying 10 Motion for Preliminary Injunction, taking under advisement 13 Motion for Judgment on the Pleadings, denying 23 Motion to Strike. Court will file an order/opinion on the motion for judgment on the pleadings. Motion hearing held on 2/2/2006 re 10 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Summum,, 9 MOTION for Partial Summary

		Judgment filed by Summum,, 13 MOTION for Judgment on the Pleadings filed by SUMMUM,, 23 MOTION to Strike filed by Summum,. Attorney for Plaintiff: Brian Barnard, Attorney for Defendant Francis Mannion and Geoffrey Surtees. (Court Reporter Ed Young.) (reb,) (Entered: 02/02/2006)
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***		
04/27/2007	248	Plaintiff's MEMORANDUM in Opposition re 245 Defendant's Motion to Stay *District Court Proceedings Pending Defendants' Petition for Rehearing En Banc and Issuance of Tenth Circuit Mandate* filed by Plaintiff Summum. (Attachments: #1 Exhibit) (Barnard, Brian) (Entered: 04/27/2007)
***		

04/30/2007	250	REPLY to response to Motion re 245 Defendant's MOTION to Stay *District Court Proceedings Pending Defendants' Petition For Rehearing En Banc and Issuance of Tenth Circuit Mandate* filed by Defendants Darold McDade, Jeff Wilson, Carol Harmer, G. Keith Corry, Frank Mills, Pleasant Grove City, Jim Danklef, Mark Atwood, Cindy Boyd, Mike Daniels, (Manion, Francis) (Entered: 04/30/2007)
***		
05/02/2007	257	DOCKET TEXT ORDER granting 245 Motion to stay; granting 247 Motion for Extension of Time to File Response/Reply; denying without prejudice to renew 252 Motion for Preliminary Injunction. The stay will be lifted upon receiving the Mandate from the Tenth Circuit Court of Appeals. Signed by Judge Dale A. Kimball on 5/2/07. No attached document. (awm) (Entered: 05/02/2007)

II. U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT -- No. 06-4057

04/17/2007	Opinion (panel decision)
08/24/2007	Order (denying rehearing and rehearing en banc with dissenting and concurring opinions)
09/25/2007	Order (staying mandate)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

Summum, a Corporate Sole and Church,	CASE NO. 2:05CV00638 DB
Plaintiff,	
vs.	COMPLAINT
PLEASANT GROVE CITY, a municipal corporation; JIM DANKLEF, Mayor; MARK ATWOOD, City Council Member; CINDY BOYD, City Council Member; MIKE DANIELS, City Council Member; DAROLD McDADE, City Council Member; JEFF WILSON, City Council Member; CAROL HARMER former City Council Member, G. KEITH CORRY, former City Council Member, and, FRANK MILLS, City Administrator,	[FILED 2005 July 29]
Defendants.	

PLAINTIFF, SUMMUM, as a complaint and cause of action against the defendants, by and through counsel states and alleges as follows:

PRELIMINARY STATEMENT

1. This is a civil action for declaratory relief and prospective injunctive relief to redress and prevent violation of civil rights protected by the Utah Constitution and the Constitution of the United States. Plaintiff seeks declaratory relief as to defendants' conduct under both the Utah Constitution and the Constitution of the United States. Plaintiff seeks injunctive relief prohibiting defendants from continuing their misconduct and from engaging in similar conduct in the future under both the Utah Constitution and the Constitution of the United States. Plaintiff seeks monetary compensation as a result of illegal and unconstitutional conduct by the defendant government entity and actors in violation of civil rights protected under the Constitution of the United States. Plaintiff makes no claim for monetary compensation under the state law claims. Plaintiff seeks attorney fees and court costs pursuant to 42 U.S.C. § 1983 and § 1988.

JURISDICTION

2. Jurisdiction is based on 28 U.S.C. § 1343 and 42 U.S.C. § 1983 for claims arising under the United States Constitution. Declaratory relief is authorized by 28 U.S.C. § 2201 and § 2202 and Rule 57 of the Federal Rules of Civil Procedure. Injunctive relief is authorized by the United States Code and Rule 65 of the Federal Rules of Civil Procedure. This court has supplemental or pendent jurisdiction pursuant to 28 U.S.C. § 1367 to hear claims under the Utah Constitution which arise from the same fact situation.

VENUE

3. The conduct complained of occurred, is occurring or will occur in Central Division of the District of Utah and in Utah County, Utah. The named individual defendant parties to this action reside in Utah county and the Central Division of the District of Utah. Defendant, Pleasant Grove City, the municipal corporation, has its place of business in the Central Division of the District of Utah.

PARTIES

4. Plaintiff, SUMMUM is a corporate sole and a church. Its world headquarters are in Salt Lake City, Utah. It was founded in Salt Lake City in 1975. SUMMUM has members in Utah County, Utah.

5. JIM DANKLEF is the duly elected and serving Mayor of Pleasant Grove. He has the administrative power to determine who will be allowed to place monuments, symbols or displays on government property belonging to the City. He has the administrative power to permit or deny to persons, groups or churches the right to place monuments, symbols or displays on government property belonging to the City.

6. FRANK MILLS is the duly appointed and serving City Administrator of Pleasant Grove. He has the administrative power to determine who will be allowed to place monuments, symbols or displays on government property belonging to the City. He has the administrative power to permit or deny to persons, groups or churches the right to place monuments,

symbols or displays on government property belonging to the City.

7. MARK ATWOOD, CINDY BOYD, MIKE DANIELS, DAROLD McDADE, and JEFF WILSON are each duly elected and serving council members of the City Council of Pleasant Grove City. Collectively they, along with the Mayor and City Administrator, have the administrative power to determine whether and who will be allowed to place monuments, symbols or displays on government property belonging to the City. Collectively they, along with the Mayor and the City Administrator, have the administrative power to permit or deny persons, groups or churches the right to place monuments, symbols or displays on government property belonging to the City.

8. CAROL HARMER AND G. KEITH CORRY were former City Council Members, duly elected and serving during the year 2003 when plaintiff originally made a request to place a monument on city property, as set forth more fully below. As council members of the City Council of Pleasant Grove City. Collectively they, along with the Mayor and City Administrator, had the administrative power to determine whether and who would be allowed to place monuments, symbols or displays on government property belonging to the City. They, along with the Mayor and the City Administrator, had the administrative power to permit or deny persons, groups or churches the right to place monuments, symbols or displays on government property belonging to the City.

9. The CITY OF PLEASANT GROVE is a government entity created pursuant to Utah statute which governs the geographic area known as Pleasant Grove City, Utah County, Utah. The City is a

governmental subdivision of the State of Utah. The City is the principal and/or employer of the individual defendants. The City has delegated to the individual defendants administrative power to determine whether and who will be allowed to place monuments and displays on property belonging to the City.

10. The individual defendants are sued personally and in their official capacities.

FACTS

11. Since approximately 1970, on a lawn of a Pleasant Grove city park in Pleasant Grove has stood a stone monolith which contains, among other recitations and religious symbols, the Ten Commandments. That real property is currently owned solely by the City, the defendant herein. That monolith is in a prominent place and is visible to the general public. That monolith is approximately fifty eight inches (58") in height and thirty two inches (32') in width. It is permanently installed in the park.

12. Said monolith was erected by the Fraternal Order of Eagles, a private non-public group, with the specific permission and approval of Pleasant Grove and its governing council. The Order of Eagles paid for the cost of the creation and installation of that monolith.

13. The Ten Commandments are religious writings and instructions which form the basis for both the Jewish and the Christian religions. According to certain religious teachings, the Ten Commandments were personally and directly revealed by God to Moses as mandates of the Jewish faith. Specific references to the Ten Commandments appear in the Bible, at Exodus 20:1-17 (enumerating the Ten Commandments

as spoken by the Lord), Exodus 34:1-28 (the Lord's renewal of the Israelites' covenants contained in the Ten Commandments by inscription in stone), Deuteronomy 4:13 (Moses' appeal to the Israelites to obey the Ten Commandments as written in stone by the Lord), and Deuteronomy 5:6-21 (Moses' recounting the Ten Commandments to the Israelites as told to him by the Lord and inscribed in stone). Stone v. Graham, 449 U.S. 39, 41 (1980); Lynch v. Donnelly, 465 U.S. 668, 677 (1984); Harvey v. Cobb County, 811 F. Supp. 669 (N.D. Ga. 1993), aff'd w/o opinion, 15 F.3d 1097 (11th Cir. 1994), *cert den'd* 511 U.S. 1129 (1994); Anderson v. Salt Lake City, 348 F. Supp. 1170 (D. Utah 1972) *rev'd* Anderson v. Salt Lake City, 475 F.2d 29 (1973).

14. The Ten Commandments monument on the lawn also contains symbols representing the All Seeing Eye of God, the Star of David, the Order of Eagles, letters of the Hebraic alphabet, and Christ or peace. See Anderson v. Salt Lake City, 475 F.2d 29, 30 (1973). The content (except for its dedication to the city and county) is identical to the monument considered in Anderson v. Salt Lake City, 475 F.2d 29, 30 (1973).

15. In a letter dated September 5, 2003, SUMMUM requested of the defendants that SUMMUM be allowed to erect a monument, containing the Seven Aphorisms of SUMMUM, on the lawn next to the Ten Commandments Monument in the City Park. A copy of that letter is attached hereto marked Exhibit "A" and is incorporated herein by reference. SUMMUM's monument is similar in appearance, size and material to that of the Ten Commandments monolith.

16. Defendants failed to respond to SUMMUM's September 5, 2003 letter. That failure is a denial of SUMMUM's request.

17. In a second letter dated May 6, 2005, SUMMUM again requested of the defendants that it be allowed to erect a monument on the lawn next to the Ten Commandments Monument in the City Park containing the Seven Aphorisms of SUMMUM.

18. Defendants failed to respond to SUMMUM's May 6, 2005 letter. That failure is a denial of SUMMUM's request.

19. The law of the Tenth Circuit clearly requires that SUMMUM be allowed to erect its monument along side that of the existing Ten Commandments monument. SUMMUM v. Callaghan, 130 F.3d 906 (10th Cir. 1997), and SUMMUM v. Ogden, 297 F.3d 995 (10th Cir. 2002).

20. Defendants and each if them are or should be aware of the decision by the United States Court of Appeal of the Tenth Circuit in SUMMUM v. Callaghan, 130 F.3d 906 (10th Cir. 1997), and SUMMUM v. Ogden, 297 F.3d 995 (10th Cir. 2002).

21. The rights of plaintiff SUMMUM are violated when the defendants give preference and endorsement to one particular set of religious beliefs by allowing the Ten Commandments monument to remain in a public park or in a forum within the public park supported by taxpayers and disallow a similar display of the religious tenets of SUMMUM.

22. The rights of plaintiff SUMMUM are violated when the defendants give preference to the Fraternal Order of Eagles in granting a forum for their viewpoints and not to SUMMUM.

23. At all times pertinent to this action, the individual defendants and each of them were acting under color of state law and with the power and authority granted to them by the laws of the state of Utah and Pleasant Grove City. At all times pertinent to this action, the individual defendants and each of them were acting pursuant to and in compliance with the policies of Pleasant Grove City.

STATUS OF THE LAW IN THE TENTH CIRCUIT

24. The United States Court of Appeals for the Tenth Circuit in SUMMUM v. Callaghan, 130 F.3d 906 (10th Cir. 1997), ruled that by allowing the erection of the Eagles' Ten Commandments Monument on the front lawn of the Salt Lake County Courthouse, Salt Lake County created a first amendment protected forum for expression.

25. The United States Court of Appeal for the Tenth Circuit reaffirmed SUMMUM v. Callaghan in its more recent decision SUMMUM v. Ogden, 297 F.3d 995 (10th Cir. 2002). The Court in that case ruled that by allowing the erection of the Eagles' Ten Commandments Monument on city property, the city of Ogden created a first amendment protected forum for expression.

CAUSES OF ACTION
FEDERAL FREE EXPRESSION CLAUSE

26. All preceding paragraphs are incorporated into this cause of action.

27. The refusal by the defendants to allow the monument of SUMMUM on the lawn of the City Park while allowing the display of the Eagles Ten Commandments monolith violates the free expression provision of the first amendment to the United States Constitution.

28. The refusal by the defendants to provide SUMMUM access to a forum similar to that provided to the Eagles violates the free expression provision of the first amendment to the United States Constitution.

29. The plaintiff is entitled to declaratory relief that the defendants' conduct is in violation of the prohibition against government interference with free expression as protected by the United States Constitution.

30. The plaintiff is entitled to injunctive relief that the defendants cease their conduct in violation of the free expression clause of the United States Constitution.

STATE FREE EXPRESSION CLAUSE

31. All preceding paragraphs are incorporated into this cause of action.

32. The refusal by the defendants to allow the monument of SUMMUM on the lawn of City Park while allowing the display of the Eagles Commandments monolith violates the free expression provision of the Utah Constitution.

33. The plaintiff is entitled to declaratory relief that the defendants' conduct is in violation of the prohibition against government interference with free expression as protected by the Utah Constitution.

34. The plaintiff is entitled to injunctive relief that the defendants cease their conduct in violation of the free expression provision of the Utah Constitution.

STATE ESTABLISHMENT CLAUSE

35. All preceding paragraphs are incorporated into this cause of action.

36. The refusal of the defendants to allow the religious monument of SUMMUM on the lawn of the City Park while allowing the display of the Eagles' religious monument violates the Establishment provision of the Utah Constitution. Society of Separationists v. Whitehead, 870 P.2d 916 (Ut. 1993); Snyder v. Murray City Corp., 73 P.3d 325 (Utah 2003).

37. The refusal of the defendants to allow the religious monument of SUMMUM on the lawn of the City Park while providing a forum to the Eagles for the display of a religious monument violates the Establishment provision of the Utah Constitution. Society of Separationists v. Whitehead, 870 P.2d 916 (Ut. 1994); Snyder v. Murray City Corp., 73 P.3d 325 (Utah 2003).

38. The plaintiff is entitled to declaratory relief that the defendants' conduct is in violation of the Establishment provision of the Utah Constitution.

39. The plaintiff is entitled to injunctive relief that the defendants cease their conduct in violation of the Establishment provision of the Utah Constitution.

IMMEDIATE EQUITABLE RELIEF

40. The plaintiff is being irreparably damaged by defendants' conduct. The plaintiff is suffering immediate harm as well as a result of defendant's conduct.

41. The plaintiff is entitled to immediate equitable relief in the nature of a temporary restraining order and a preliminary injunction to allow plaintiff to erect and display its monument during the pendency of this action.

DAMAGES

42. The plaintiff has suffered and will continue to suffer harm as a result of defendants' conduct, not to exceed twenty dollars ($20.00). Plaintiff's federal constitutional rights have been violated by the actions of defendants' as set forth above. Plaintiff is entitled to general and special damages. Likewise, the plaintiff is entitled to an award of punitive damages against the individual defendants and each of them. Plaintiff's constitutional rights have been willfully violated by the actions of defendants as set forth above. Defendants and each of them are or should be aware of the decisions of the Court of Appeals for the Tenth Circuit and each is aware of their obligation under those decisions to allow SUMMUM to erect its monument. Without justification in law or in fact, defendants denied SUMMUM the constitutional rights to display their religious ideas in a government created forum. Plaintiff is entitled to punitive damages. Plaintiff waives all damages in excess of twenty dollars ($20.00).

43. Plaintiff makes no claim for monetary compensation under its state law claims.

ATTORNEY FEES AND COSTS

44. The plaintiff has incurred and will incur attorney fees and court costs in the pursuit of this matter.

45. Pursuant to 42 U.S.C. § 1983 and § 1988, plaintiff is entitled to reimbursement for said attorney fees and court costs.

DEMAND FOR RELIEF

WHEREFORE, the plaintiff demand the following relief:

1. Plaintiff is entitled to declaratory and injunctive relief that the defendants' conduct is in violation of the free expression protections of the First Amendment to the United States Constitution.

2. Plaintiff is entitled to declaratory and injunctive relief that the defendants' conduct is in violation of the free expression and establishment protections of the Utah Constitution.

3. Plaintiff is entitled to injunctive relief and an order that the defendants immediately allow plaintiff SUMMUM to erect its monument.

4. Plaintiff seek money damages against defendants in the sum of at least one dollar ($1.00) each, but in a larger sum (not to exceed twenty dollars ($20.00)) as to be determined at trial for the violation of SUMMUM's federal claims.

5. For an award of attorney fees and court costs under 42 U.S.C. § 1983 and § 1988.

6. For such other and further relief as the court deems just and proper.

Dated this 28th day of JULY 2005.

UTAH LEGAL CLINIC
Attorneys for Plaintiff

By /s/ James L. Harris, Jr.
For BRIAN M. BARNARD

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Summum,	) Case No. 02:05-CV-0638-DB
Plaintiff,	)
	) DEFENDANT
	) PLEASANT
v.	) GROVE CITY'S
	) ANSWER TO
Pleasant Grove City,	) COMPLAINT
et al.	)
Defendants.	) Chief Judge
	) Dee Benson

Filed U.S. District Court
2005 SEP 1

Defendant, Pleasant Grove City, by way of Answer to the Complaint, states as follows:[1]

1. As to the allegations in paragraph 1 of the Complaint, Pleasant Grove City admits that these are plaintiff's allegations and denies the validity of same.

2. As to the allegations in paragraph 2 of the Complaint, Pleasant Grove City admits that these are plaintiff's allegations and denies the validity of same.

3. As to the allegations in paragraph 3 of the Complaint, Pleasant Grove City admits the allegations

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[1]This Answer is being submitted on behalf of defendant Pleasant Grove City only, because Pleasant Grove City has been the only defendant served in this action. This Answer is not intended to waive any rights, defenses, or objections to the lawsuit or to the jurisdiction or venue of the court that are held by the other named defendants.

in the first and third sentences of said paragraph. Pleasant Grove City is presently without sufficient knowledge or information to form a belief as to the truth of the allegations in the second sentence of said paragraph and on that basis denies same.

4. As to the allegations in paragraph 4 of the Complaint, Pleasant Grove City is presently without sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 4 and on that basis denies them.

5. As to the allegations in paragraph 5 of the Complaint, Pleasant Grove City admits that Jim Danklef is the Mayor of Pleasant Grove and denies the remaining allegations in said paragraph.

6. As to the allegations in paragraph 6 of the Complaint, Pleasant Grove City admits that Frank Mills is the City Administrator of Pleasant Grove City and denies the remaining allegations in said paragraph.

7. As to the allegations in paragraph 7 of the Complaint, Pleasant Grove City admits that Mark Atwood, Cindy Boyd, Mike Daniels, Darold McDade, and Jeff Wilson are current members of the City Council of Pleasant Grove City. Pleasant Grove City admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove City as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove City and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019,

effective August 3, 2004. (A true and correct copy of the City's letter to plaintiff dated November 19, 2003, is attached hereto as Exhibit 1, and a true and correct copy of Resolution No. 2004-019 is attached hereto as Exhibit 2.) Pleasant Grove City denies that the Mayor or the City Administrator has a vote on the city council, and states that the Mayor may only cast a vote to break a tie of the city council.

8. As to the allegations in paragraph 8 of the Complaint, Pleasant Grove City admits that Carol Harmer and G. Keith Corry were former city counsel members. Pleasant Grove City admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove City as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove City and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (Exhibits 1 & 2, hereto.) Pleasant Grove City denies that the Mayor or the City Administrator has a vote on the city council, and states that the Mayor may only cast a vote to break a tie of the city council.

9. As to the allegations in paragraph 9 of the Complaint, Pleasant Grove City admits as to the status of City, and denies that the City is the employer of the individual defendants, except for City Administrator Frank Mills. Pleasant Grove City admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols,

or displays on government property belonging to Pleasant Grove City as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove City and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (Exhibits 1 & 2, hereto.) Pleasant Grove City denies the remaining allegations in paragraph 9.

10. As to the allegations in paragraph 10 of the Complaint, Pleasant Grove City admits that those are plaintiff's allegations and denies the validity of same.

11. As to the allegations in paragraph 11 of the Complaint, Pleasant Grove City admits that a Fraternal Order of Eagles monument containing a version of the Ten Commandments, among other recitations and symbols, has stood in a city park since 1971, and denies that the monument is in a prominent place or visible to the general public.

12. As to the allegations in paragraph 12 of the Complaint, Pleasant Grove City admits same.

13. As to the allegations in paragraph 13 of the Complaint, Pleasant Grove City admits that the Ten Commandments are believed by Jews and Christians to be religious writings and instructions that form part of the basis of their religions, that certain religious teachings state that the Ten Commandments were personally and directly revealed by God to Moses as mandates of the Jewish faith, and that the Ten Commandments are referred to in the Bible. The remaining allegations of said paragraph require no response, and the scripture passages and case law

citations referred to in said paragraph speak for themselves.

14. As to the allegations in paragraph 14 of the Complaint, Pleasant Grove City admits same and states that the monument in question contains other symbols and/or recitations as well.

15. As to the allegations in paragraph 15 of the Complaint, Pleasant Grove City admits that it received a letter from plaintiff dated September 5, 2003, and the letter speaks for itself. Pleasant Grove City is without sufficient knowledge or information to respond to the allegation regarding the appearance, size, and material of plaintiff's alleged monument and denies same.

16. As to the allegations in paragraph 16 of the Complaint, Pleasant Grove City admits that it did not respond to plaintiff's letter of September 5, 2003, but states that on or about November 19, 2003, it did respond to plaintiff's second letter dated September 17, 2003. (Exhibit 1, hereto; a true and correct copy of plaintiff's second letter dated September 17, 2003, is attached hereto as Exhibit 3.) Pleasant Grove City denies the remaining allegations in paragraph 16 of the Complaint.

17. As to the allegations in paragraph 17 of the Complaint, Pleasant Grove City denies same. As stated in paragraph 16 above, the second letter Pleasant Grove City received from plaintiff was dated September 17, 2003, to which the City responded on or about November 19, 2003. (Exhibits 1 & 3, hereto.) Pleasant Grove City further states that under the terms of the alleged May 6, 2005, letter of plaintiff, which is attached as Exhibit B to the Complaint and which speaks for itself, no response was required.

18. As to the allegations in paragraph 18 of the Complaint, Pleasant Grove City denies same and states that it responded on or about November 19, 2003, to plaintiff's second letter dated September 17, 2003. Pleasant Grove City further states that under the terms of the alleged May 6, 2005, letter of plaintiff, which is attached as Exhibit B to the Complaint and which speaks for itself, no response was required.

19. As to the allegations in paragraph 19 of the Complaint, Pleasant Grove City denies same.

20. As to the allegations in paragraph 20 of the Complaint, Pleasant Grove City states that the allegations are not factual allegations, but statements of plaintiff's understanding of the law, and no response is required thereto.

21. As to the allegations in paragraph 21 of the Complaint, Pleasant Grove City denies same.

22. As to the allegations in paragraph 22 of the Complaint, Pleasant Grove City denies same.

23. As to the allegations in paragraph 23 of the Complaint, Pleasant Grove City is presently without sufficient knowledge or information to form a belief as to the truth of the allegations in said paragraph and on that basis denies same.

STATUS OF THE LAW OF THE TENTH CIRCUIT

24. As to the allegations in paragraph 24 of the Complaint, Pleasant Grove City denies same.

25. As to the allegations in paragraph 25 of the Complaint, Pleasant Grove City denies same.

CAUSES OF ACTION

FEDERAL FREE EXPRESSION CLAUSE

26. As to the allegations in paragraph 26 of the Complaint, Pleasant Grove City incorporates herein its responses to all preceding allegations.

27. As to the allegations in paragraph 27 of the Complaint, Pleasant Grove City denies same.

28. As to the allegations in paragraph 28 of the Complaint, Pleasant Grove City denies same.

29. As to the allegations in paragraph 29 of the Complaint, Pleasant Grove City denies same.

30. As to the allegations in paragraph 30 of the Complaint, Pleasant Grove City denies same.

STATE FREE EXPRESSION CLAUSE

31. As to the allegations in paragraph 31 of the Complaint, Pleasant Grove City incorporates herein its responses to all preceding allegations.

32. As to the allegations in paragraph 32 of the Complaint, Pleasant Grove City denies same.

33. As to the allegations in paragraph 33 of the Complaint, Pleasant Grove City denies same.

34. As to the allegations in paragraph 34 of the Complaint, Pleasant Grove City denies same.

STATE ESTABLISHMENT CLAUSE

35. As to the allegations in paragraph 35 of the Complaint, Pleasant Grove City incorporates herein its responses to all preceding allegations.

36. As to the allegations in paragraph 36 of the Complaint, Pleasant Grove City denies same.

37. As to the allegations in paragraph 37 of the Complaint, Pleasant Grove City denies same.

38. As to the allegations in paragraph 38 of the Complaint, Pleasant Grove City denies same.

39. As to the allegations in paragraph 39 of the Complaint, Pleasant Grove City denies same.

IMMEDIATE EQUITABLE RELIEF

40. As to the allegations in paragraph 40 of the Complaint, Pleasant Grove City denies same.

41. As to the allegations in paragraph 41 of the Complaint, Pleasant Grove City denies same.

DAMAGES

42. As to the allegations in paragraph 42 of the Complaint, Pleasant Grove City denies same.

43. As to the allegations in paragraph 43 of the Complaint, Pleasant Grove City admits same.

ATTORNEY FEES AND COSTS

44. As to the allegations in paragraph 44 of the Complaint, Pleasant Grove City denies same.

45. As to the allegations in paragraph 45 of the Complaint, Pleasant Grove City denies same.

DEMAND FOR RELIEF

46. Pleasant Grove City denies that plaintiff is entitled to any relief sought in paragraphs 1, 2, 3, 4, 5,

and 6 of the "Demand for Relief" section of plaintiff's Complaint.

GENERAL DENIAL

47. Any allegation not specifically admitted in this Answer is hereby denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted against Pleasant Grove City.

SECOND AFFIRMATIVE DEFENSE

This court lacks subject matter jurisdiction over this action.

THIRD AFFIRMATIVE DEFENSE

Plaintiff lacks standing to pursue this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of laches

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part as Pleasant Grove City did not violate any constitutional,

statutory, or common law rights, privilege, or immunity of plaintiff.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims against Pleasant Grove City are barred in whole or in part as Pleasant Grove City's actions were not pursuant to any unconstitutional policy, practice, custom, usage, rule, or regulation.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against Pleasant Grove City are barred in whole or in part because plaintiff has suffered no compensable injury or damage as a result of the conduct of Pleasant Grove City.

EIGHTH AFFIRMATIVE DEFENSE

To the extent plaintiff has failed to mitigate its damages, if any, any potential recovery under such claims advanced by plaintiff's Complaint should be barred or appropriately reduced.

NINTH AFFIRMATIVE DEFENSE

Plaintiff has failed to plead with specificity the special damages it claims in this action. Fed. R. Civ. P. 9(g).

TENTH AFFIRMATIVE DEFENSE

Plaintiff cannot obtain punitive damages from Pleasant Grove City, a municipality. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff failed to comply with the procedures of Resolution No. 2004-019 and failed to exhaust all administrative remedies.

TWELFTH AFFIRMATIVE DEFENSE

Pleasant Grove City's actions have at all times complied with the First Amendment of the United States Constitution and Article I, section 4 of the Utah Constitution.

THIRTEENTH AFFIRMATIVE DEFENSE

Pleasant Grove City states that it has or may have further and additional affirmative defenses that are not yet known, which may become known through future discovery. Pleasant Grove City asserts each and every affirmative defense as it may be ascertained through future discovery in this matter.

WHEREFORE, defendant Pleasant Grove City prays that plaintiff's Complaint be dismissed with prejudice and that plaintiff takes nothing by it, and for such other and further relief as may be appropriate

under the circumstances, including attorneys' fees and costs.

Respectfully submitted on this 30th day of August, 2005.

Respectfully submitted,

/s/ Francis J. Manion by
Edward L. White with permission
Francis J. Manion*
American Center for Law and Justice
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502-549-7020; Fax. 502-549-5252
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/s/ Edward L. White
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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Summum,	)	Case No. 02:05CV 0638 DB
Plaintiff,	)	
v.	)	DEFENDANT JIM
	)	DANKLEF'S AMENDED
	)	ANSWER TO COMPLAINT
Pleasant Grove	)	
City, et al.	)	
Defendants.	)	Chief Judge Dee Benson

Defendant, Jim Danklef, Mayor, by way of Amended Answer to the Complaint, states as follows:

1. As to the allegations in paragraph 1 of the Complaint, Jim Danklef admits that these are plaintiff's allegations and denies the validity of same.

2. As to the allegations in paragraph 2 of the Complaint, Jim Danklef admits that these are plaintiff's allegations and denies the validity of same.

3. As to the allegations in paragraph 3 of the Complaint, Jim Danklef admits the allegations in the first and third sentences of said paragraph. Jim Danklef admits the allegations in the second sentence of said paragraph as they relate to him and is presently without sufficient knowledge or information to form a belief as to the truth of the other allegations in the second sentence of said paragraph and on that basis denies same.

4. As to the allegations in paragraph 4 of the Complaint, Jim Danklef is presently without sufficient knowledge or information to form a belief as to the

truth of the allegations in paragraph 4 and on that basis denies them.

5. As to the allegations in paragraph 5 of the Complaint, Jim Danklef admits that he is the Mayor of Pleasant Grove and denies the remaining allegations in said paragraph.

6. As to the allegations in paragraph 6 of the Complaint, Jim Danklef admits that Frank Mills is the City Administrator of Pleasant Grove and denies the remaining allegations in said paragraph.

7. As to the allegations in paragraph 7 of the Complaint, Jim Danklef admits that Mark Atwood, Cindy Boyd, Mike Daniels, Darold McDade, and Jeff Wilson are current members of the City Council of Pleasant Grove. Jim Danklef admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (A true and correct copy of the City's letter to plaintiff dated November 19, 2003, is attached hereto as Exhibit 1, and a true and correct copy of Resolution No. 2004-019 is attached hereto as Exhibit 2.) Jim Danklef denies that the Mayor or the City Administrator has a vote on the city council, and states that the Mayor may only cast a vote to break a tie of the city council.

8. As to the allegations in paragraph 8 of the Complaint, Jim Danklef admits that Carol Harmer

and G. Keith Corry were former city council members. Jim Danklef admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (Exhibits 1 & 2, hereto.) Jim Danklef denies that the Mayor or the City Administrator has a vote on the city council, and states that the Mayor may only cast a vote to break a tie of the city council.

9. As to the allegations in paragraph 9 of the Complaint, Jim Danklef admits as to the status of City, and denies that the City is the employer of the individual defendants, except for City Administrator Frank Mills. Jim Danklef admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (Exhibits 1 & 2, hereto.) Jim Danklef denies the remaining allegations in paragraph 9.

10. As to the allegations in paragraph 10 of the Complaint, Jim Danklef admits that those are plaintiff's allegations and denies the validity of same.

11. As to the allegations in paragraph 11 of the Complaint, Jim Danklef admits that a Fraternal Order of Eagles monument containing a version of the Ten Commandments, among other recitations and symbols, has stood in a city park since 1971, and denies that the monument is in a prominent place or visible to the general public.

12. As to the allegations in paragraph 12 of the Complaint, Jim Danklef admits same.

13. As to the allegations in paragraph 13 of the Complaint, Jim Danklef admits that the Ten Commandments are believed by Jews and Christians to be religious writings and instructions that form part of the basis of their religions, that certain religious teachings state that the Ten Commandments were personally and directly revealed by God to Moses as mandates of the Jewish faith, and that the Ten Commandments are referred to in the Bible. The remaining allegations of said paragraph require no response, and the scripture passages and case law citations referred to in said paragraph speak for themselves.

14. As to the allegations in paragraph 14 of the Complaint, Jim Danklef admits same and states that the monument in question contains other symbols and/or recitations as well.

15. As to the allegations in paragraph 15 of the Complaint, Jim Danklef admits that the City received a letter from plaintiff dated September 5, 2003, and the letter speaks for itself. Jim Danklef is without sufficient knowledge or information to respond to the

allegation regarding the appearance, size, and material of plaintiff's alleged monument and denies same.

16. As to the allegations in paragraph 16 of the Complaint, Jim Danklef admits that the City did not respond to plaintiff's letter of September 5, 2003, but states that on or about November 19, 2003, it did respond to plaintiff's second letter dated September 17, 2003. (Exhibit 1, hereto; a true and correct copy of plaintiff's second letter dated September 17, 2003, is attached hereto as Exhibit 3.) Jim Danklef denies the remaining allegations in paragraph 16 of the Complaint.

17. As to the allegations in paragraph 17 of the Complaint, Jim Danklef denies same. As stated in paragraph 16 above, the second letter Pleasant Grove City received from plaintiff was dated September 17, 2003, to which the City responded on or about November 19, 2003. (Exhibits 1 & 3, hereto.) Jim Danklef further states that under the terms of the alleged May 6, 2005, letter of plaintiff, which is attached as Exhibit B to the Complaint and which speaks for itself, no response was required.

18. As to the allegations in paragraph 18 of the Complaint, Jim Danklef denies same and states that the City responded on or about November 19, 2003, to plaintiff's second letter dated September 17, 2003. Jim Danklef further states that under the terms of the alleged May 6, 2005, letter of plaintiff, which is attached as Exhibit B to the Complaint and which speaks for itself, no response was required.

19. As to the allegations in paragraph 19 of the Complaint, Jim Danklef denies same.

20. As to the allegations in paragraph 20 of the Complaint, Jim Danklef states that the allegations are

not factual allegations, but statements of plaintiff's understanding of the law, and no response is required thereto.

21. As to the allegations in paragraph 21 of the Complaint, Jim Danklef denies same.

22. As to the allegations in paragraph 22 of the Complaint, Jim Danklef denies same.

23. As to the allegations in paragraph 23 of the Complaint, Jim Danklef admits same as they relate to him and is presently without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in said paragraph and on that basis denies same.

STATUS OF THE LAW OF THE TENTH CIRCUIT

24. As to the allegations in paragraph 24 of the Complaint, Jim Danklef denies same.

25. As to the allegations in paragraph 25 of the Complaint, Jim Danklef denies same.

CAUSES OF ACTION FEDERAL FREE EXPRESSION CLAUSE

26. As to the allegations in paragraph 26 of the Complaint, Jim Danklef incorporates herein his responses to all preceding allegations.

27. As to the allegations in paragraph 27 of the Complaint, Jim Danklef denies same.

28. As to the allegations in paragraph 28 of the Complaint, Jim Danklef denies same.

29. As to the allegations in paragraph 29 of the Complaint, Jim Danklef denies same.

30. As to the allegations in paragraph 30 of the Complaint, Jim Danklef denies same.

STATE FREE EXPRESSION CLAUSE

31. As to the allegations in paragraph 31 of the Complaint, Jim Danklef incorporates herein his responses to all preceding allegations.

32. As to the allegations in paragraph 32 of the Complaint, Jim Danklef denies same.

33. As to the allegations in paragraph 33 of the Complaint, Jim Danklef denies same.

34. As to the allegations in paragraph 34 of the Complaint, Jim Danklef denies same.

STATE ESTABLISHMENT CLAUSE

35. As to the allegations in paragraph 35 of the Complaint, Jim Danklef incorporates herein his responses to all preceding allegations.

36. As to the allegations in paragraph 36 of the Complaint, Jim Danklef denies same.

37. As to the allegations in paragraph 37 of the Complaint, Jim Danklef denies same.

38. As to the allegations in paragraph 38 of the Complaint, Jim Danklef denies same.

39. As to the allegations in paragraph 39 of the Complaint, Jim Danklef denies same.

IMMEDIATE EQUITABLE RELIEF

40. As to the allegations in paragraph 40 of the Complaint, Jim Danklef denies same.

41. As to the allegations in paragraph 41 of the Complaint, Jim Danklef denies same.

DAMAGES

42. As to the allegations in paragraph 42 of the Complaint, Jim Danklef denies same.

43. As to the allegations in paragraph 43 of the Complaint, Jim Danklef admits same.

ATTORNEY FEES AND COSTS

44. As to the allegations in paragraph 44 of the Complaint, Jim Danklef denies same.

45. As to the allegations in paragraph 45 of the Complaint, Jim Danklef denies same.

DEMAND FOR RELIEF

46. Jim Danklef denies that plaintiff is entitled to any relief sought in paragraphs 1, 2, 3, 4, 5, and 6 of the "Demand for Relief" section of plaintiff's Complaint.

GENERAL DENIAL

47. Any allegation not specifically admitted in this Answer is hereby denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted against Jim Danklef.

SECOND AFFIRMATIVE DEFENSE

This court lacks subject matter jurisdiction over this action

THIRD AFFIRMATIVE DEFENSE

Plaintiff lacks standing to pursue this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part as Jim Danklef did not violate any constitutional, statutory, or common law rights, privilege, or immunity of plaintiff.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims against Jim Danklef are barred in whole or in part as Jim Danklef's actions were not pursuant to any unconstitutional policy, practice, custom, usage, rule, or regulation.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against Jim Danklef are barred in whole or in part because plaintiff has suffered no compensable injury or damage as a result of the conduct of Jim Danklef.

EIGHTH AFFIRMATIVE DEFENSE

To the extent plaintiff has failed to mitigate its damages, if any, any potential recovery under such claims advanced by plaintiff's Complaint should be barred or appropriately reduced.

NINTH AFFIRMATIVE DEFENSE

Plaintiff has failed to plead with specificity the special damages it claims in this action. Fed. R. Civ. P. 9(g).

TENTH AFFIRMATIVE DEFENSE

Plaintiff cannot obtain punitive damages from Pleasant Grove City, a municipality, or from any defendant sued in his or her official capacity. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff failed to comply with the procedures of Resolution No. 2004-019 and failed to exhaust all administrative remedies.

TWELFTH AFFIRMATIVE DEFENSE

Jim Danklef's actions have at all times complied with the First Amendment of the United States Constitution and Article I, section 4 of the Utah Constitution.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part as any and all actions or inactions on the part of Jim Danklef did not violate clearly established law, were objectively reasonable, and therefore Jim Danklef is entitled to qualified immunity from suit.

FOURTEENTH AFFIRMATIVE DEFENSE

Jim Danklef is entitled to absolute and/or legislative immunity as to all claims against him.

FIFTEENTH AFFIRMATIVE DEFENSE

Jim Danklef states that he has or may have further and additional affirmative defenses that are not yet known, which may become known through future discovery. Jim Danklef asserts each and every affirmative defense as it may be ascertained through future discovery in this matter.

WHEREFORE, defendant Jim Danklef prays that plaintiff's Complaint be dismissed with prejudice and that plaintiff takes nothing by it, and for such other and further relief as may be appropriate under the circumstances, including attorneys' fees and costs.

Respectfully submitted on this 12th day of October, 2005.

Meb Anderson, USB # 10227
Stirba & Associates
215 S. State Street, Suite 1150
P.O. Box 810
Salt Lake City, Utah 84110-0810
(801) 364-8300

/s/ Francis J. Manion by
Edward L. White w/permission
Francis J. Manion*
American Center for Law & Justice
6375 New Hope Road
New Hope, Kentucky 40052
(502) 549-7020
*Pro hac vice application granted

/s/ Edward L. White
Edward L. White III*
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106
(734) 827-2001
*Pro hac vice application granted

Counsel for defendants Pleasant Grove City & Mayor Jim Danklef

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Summum, a Corporate Sole and Church, Plaintiff, vs. PLEASANT GROVE CITY, a municipal corporation; JIM DANKLEF, Mayor; MARK ATWOOD, City Council Member; CINDY BOYD, City Council Member; MIKE DANIELS City Council Member; DAROLD McDADE, City Council Member; JEFF WILSON, City Council Member; CAROL HARMER, former City Council Member; G. KEITH CORRY, former City Council Member, and, FRANK MILLS, City Administrator, Defendants.	PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS CASE NO. 02-05-CV-00638 DB [FILED 2005 OCT 14]

PLAINTIFF, SUMMUM, by and through counsel, Brian M. Barnard of the Utah Legal Clinic as cooperating attorneys for the Utah Civil Rights &

Liberties Foundation, Inc. presents the following STATEMENT OF FACTS in support of plaintiff's forthcoming MOTION FOR PARTIAL SUMMARY JUDGMENT & MOTION FOR PRELIMINARY INJUNCTION.

1. Jurisdiction is based on 28 U.S.C. §1343 and 42 U.S.C. § 1983 for claims arising under the United States Constitution. Declaratory relief is authorized by 28 U.S.C. § 2201 and § 2202 and Rule 57 of the Federal Rules of Civil Procedure. Injunctive relief is authorized by the United States Code and Rule 65 of the Federal Rules of Civil Procedure. This court has supplemental or pendent jurisdiction pursuant to 28 U.S.C. § 1367 to hear claims under the Utah Constitution which arise from the same fact situation. Cmplt., ¶ 2 (Docket #1).

2. The conduct complained of occurred, is occurring or will occur in the Central Division of the District of Utah and Utah County, Utah. Def. PG City's Answer, ¶ 3 (Docket #4.). The named individual defendant parties to this action reside in Utah County and the Central Division of the District of Utah, Defendant, Pleasant Grove City, the municipal corporation, has its place of business in the Central Division of the District of Utah. Def. PG City's Answer, ¶ 3; Cmplt., ¶ 3.

3. Plaintiff, SUMMUM is a corporate sole and a church. Its world headquarters are in Salt Lake City, Utah. It was founded in Salt Lake City in 1975. SUMMUM has members in Utah County, Utah. Cmplt., ¶ 4; Aff. S. Ra., ¶ 3 (Docket #2).

4. JIM DANKLEF is the duly elected and serving Mayor of Pleasant Grove. Def. PG City's Answer, ¶5. He has the administrative power to

determine who will be allowed to place monuments, symbols or displays on government property belonging to the City. He has the administrative power to permit or deny to persons, groups or churches the right to place monuments, symbols or displays on government property belonging to the City. Cmplt., ¶ 5.

5. FRANK MILLS is the duly appointed and serving City Administrator of Pleasant Grove. Def. PG City's Answer, ¶ 6. He has the administrative power to determine who will be allowed to place monuments, symbols or displays on government property belonging to the City. Cmplt., ¶ 6.

6. MARK ATWOOD, CINDY BOYD, MIKE DANIELS, DAROLD McDADE, and JEFF WILSON are each duly elected and are currently serving council members of the City Council of Pleasant Grove City. Collectively they have the administrative power to determine whether and who will be allowed to place monuments, symbols or displays on government property belonging to the City. Collectively they have the administrative power to permit or deny persons, groups or churches the right to place monuments, symbols or displays on government property belonging to the City. Cmplt., ¶ 7; Def. PG City's Answer, ¶ 7.

7. CAROL HARMER and G. KEITH CORRY were former City Council Members, duly elected and serving during the year 2003 when plaintiff originally made a request to place a monument on city property, as set forth more fully below. As former council members of the City Council of Pleasant Grove City collectively they had the administrative power to determine whether and who would be allowed to place monuments, symbols or displays on government property belonging to the City. They had the

administrative power to permit or deny persons, groups or churches the right to place monuments, symbols or displays on government property belonging to the City. Cmplt., ¶ 8; Def. PG City's Answer, ¶ 8.

8. The CITY OF PLEASANT GROVE is a government entity created pursuant to Utah statute which governs the geographic area known as Pleasant Grove City, Utah County, Utah. The City is a governmental subdivision of the State of Utah. Def. PG City's Answer, ¶ 9. The City is the principal and/or employer of the individual defendants. The City has delegated to the individual defendants power to determine whether and who will be allowed to place monuments and displays on property belonging to the City. Def. PG City's Answer, ¶ 9; Cmplt., ¶ 9.

9. Since approximately 1970, on a lawn in the midst of a Pleasant Grove city park in Pleasant Grove has stood a stone monolith which contains, among other recitations and religious symbols, the Ten Commandments. Def. PG City's Answer, ¶ 11. That real property is currently owned solely by the City, the defendant herein. That monolith is in a prominent place and is visible to the general public. That monolith is approximately fifty eight inches (58") in height and thirty two inches (32') in width. It is permanently installed in the park. Cmplt., ¶ 11; Aff. S. Ra, ¶ 4.

10. Said monolith was erected by the Fraternal Order of Eagles, a private non-public group, with the specific permission and approval of Pleasant Grove and its governing council. The Order of Eagles paid for the creation and installation of that monolith. Cmplt., ¶ 12; Aff. S. Ra, ¶ 5; Def. PG City's Answer, ¶ 12.

11. The Ten Commandments are religious writings and instructions which form the basis for both the Jewish and the Christian religions. According to certain religious teachings, the Ten Commandments were personally and directly revealed by God to Moses as mandates of the Jewish faith. The Ten Commandments appear in the Bible. Def. PG City's Answer, ¶ 13. Specific references to the Ten Commandments appear, at Exodus 20:1-17 (enumerating the Ten Commandments as spoken by the Lord), Exodus 34:1-28 (the Lord's renewal of the Israelites' covenants contained in the Ten Commandments by inscription in stone), Deuteronomy 4:13 (Moses' appeal to the Israelites to obey the Ten Commandments as written in stone by the Lord), and Deuteronomy 5:6-21 (Moses' recounting the Ten Commandments to the Israelites as told to him by the Lord and inscribed in stone). McCreary County v. ACLU of Ky, 125 S. Ct. 2722 (2005); Van Orden v. Perry, 125 S. Ct 2854 (2005); Stone v. Graham, 449 U.S. 39, 41 (1980); Lynch v. Donnelly, 465 U.S. 668, 667 (1984); Society of Separationist v. Pleasant Grove, ___ F.3d ___ n.1 (10th Cir. 2005). Cmplt. ¶ 13; Aff. S. Ra., ¶ 6.

12. The Ten Commandments monument on the lawn also contains symbols representing the All Seeing Eye of God, the Star of David, the Order of Eagles, letters of the Hebraic alphabet, and Christ or peace. Def. PG City's Answer, ¶ 14. The content (except for its dedication to the city and county) is identical to the monument considered in Anderson v. Salt Lake City, 475 F.2d 29, 30 (1973). Cmplt., ¶ 14; Aff. S. Ra, ¶ 7.

13. In a letter dated September 5, 2003 (attached hereto), SUMMUM requested of the defendants that

SUMMUM be allowed to erect a monument, containing the Seven Aphorisms of SUMMUM, on the lawn near to the Ten Commandments Monument in the City Park. Def. PG City's Answer ¶15. SUMMUM's monument is similar in appearance, size and material to that of the Ten Commandments monolith. Cmplt., ¶ 15; Aff. S. Ra, ¶ 8.

14. Defendants failed to respond to SUMMUM's September 5, 2003 letter. Def. PG City's Answer, ¶ 16. That failure is a denial of SUMMUM's request. Cmplt., ¶ 16; Aff. S. Ra, ¶ 9.

15. SUMMUM wrote a second letter dated September 17, 2003 (attached hereto). SUMMUM did not receive a response although defendant's assert that they did respond nearly two (2) months later in a letter dated November 19, 2003 (attached hereto). That response was a rejection. Def. PG City's Answer, ¶ 16.

16. Defendants' rejection in November 2003 was undertaken without any written rules, regulations, etc. Def. PG City's Answer, ¶¶ 7-8. No right to appeal was afforded to SUMMUM. Def. PG City's Answer, ¶ 16.

17. In a third letter dated May 6, 2005 (attached hereto), SUMMUM again requested that it be allowed to erect a monument on the lawn near to the Ten Commandments Monument in the City Park containing the Seven Aphorisms of SUMMUM. Cmplt., ¶ 17; Aff. S. Ra, ¶ 10.

18. Defendants failed to respond to SUMMUM's May 6, 2005 letter. That failure was again a denial of SUMMUM's request. Cmplt., ¶ 18; Aff. S. Ra, ¶ 11.

19. The law of the Tenth Circuit clearly requires that SUMMUM be allowed to erect its monument near the existing Ten Commandments monument. SUMMUM v. Callaghan, 130 F.3d 906 (10th Cir. 1997),

and SUMMUM v. Ogden, 297 F.3d 995 (10th Cir. 2002). Cmplt., ¶ 19; Aff. S. Ra, ¶ 12.

20. The rights of plaintiff SUMMUM are violated when the defendants give preference and endorsement to one particular set of religious beliefs by allowing the Ten Commandments monument to remain in a public park or in a forum within the public park supported by taxpayers and disallow a similar display of the religious tenets of SUMMUM. Cmplt., ¶ 21; Aff. S. Ra, ¶ 14.

21. The rights of plaintiff SUMMUM are violated when the defendants give preference to the Fraternal Order of Eagles in granting a forum for their viewpoints and not to SUMMUM. Cmplt., ¶ 22; Aff. S. Ra, ¶ 15.

22. At all times pertinent to this action, the individual defendants and each of them were acting under color of state law and with the power and authority granted to them by the laws of the state of Utah and Pleasant Grove City. At all times pertinent to this action, the individual defendants and each of them were acting pursuant to and in compliance with the policies of Pleasant Grove City. Cmplt., ¶ 23; Aff. S. Ra, ¶ 16.

23. The United States Court of Appeal for the Tenth Circuit in SUMMUM v. Callaghan, 130 F.3d 906 (10th Cir. 1997), ruled that by allowing the erection of the Eagles' Ten Commandments Monument on the front lawn of the Salt Lake County Courthouse, Salt Lake County created a first amendment protected forum for expression. Cmplt., ¶ 24.

24. The United States Court of Appeal for the Tenth Circuit reaffirmed SUMMUM v. Callaghan in its more recent decision SUMMUM v. Ogden, 297 F.3d

995 (10th Cir. 2002). The Court in that case ruled that by allowing the erection of the Eagles' Ten Commandments Monument on city property, the city of Ogden created a first amendment protected forum for expression. Cmplt., ¶ 25.

25. The plaintiff is being irreparable damaged by defendants' conduct. The plaintiff is suffering immediate harm as a result of defendants' conduct. Cmplt., ¶ 40.

26. The plaintiff is entitled to immediate equitable relief in the nature of a temporary restraining order and a preliminary injunction to allow plaintiff to erect and display its monument during the pendency of this action. Cmplt., ¶ 41.

27. The Plaintiff has suffered and will continue to suffer harm as a result of defendants' conduct. Plaintiff's federal constitutional rights have been violated by the actions of defendants' as set forth above. Plaintiff is entitled to general and special damages. Likewise, the plaintiff is entitled to an award of punitive damages against the individual defendants and each of them. Plaintiff's constitutional rights have been willfully violated by the actions of defendants as set forth above. Defendants and each of them are or should be aware of the decisions of the Court of Appeals for the Tenth Circuit and each is aware of their obligation under those decisions to allow SUMMUM to erect its monument. Without justification in law or in fact, defendants denied SUMMUM the constitutional right to display their religious ideals in a government created forum. Plaintiff is entitled to punitive damages. Cmplt., ¶ 42.

28. The plaintiff has incurred and will incur attorney fees and court costs in the pursuit of this matter. Cmplt., ¶ 44; Aff. S. Ra, ¶ 19.

Dated this12th day of OCTOBER 2005.

UTAH LEGAL CLINIC
Attorney for Plaintiff

By /s/ James L. Harris, Jr.
BRIAN M. BARNARD
JAMES L. HARRIS, Jr.

EXHIBIT A

SUMMUM

September 05, 2003

The Hon. Jim Danklet
Mayor
Pleasant Grove City Hall
70 South 100 East
Pleasant Grove, Utah 84062.

Re: Religious Monuments

Dear Mayor Danklet:

SUMMUM is a religious organization founded in 1975 with world headquarters in Salt Lake City, Utah. Our religion is based upon teachings that precede the ancient Egyptians. Those teachings are summarized in our Seven Aphorisms.

We understand that the City of Pleasant Grove has a granite monument in the City Park near 100 North & 100 East that contains the Ten Commandments. That monument was donated and erected by the Fraternal Order of Eagles.

We would like to erect a monument similar in size and nature in that same city park. Our stone monument would contain the Seven Aphorism of SUMMUM and would be complementary in content

and appearance to the Ten Commandments monument. SUMMUM would pay for the cost of creating the monument and erecting it in the city park. Our monument should be placed near the Ten Commandments monument. Our monument would be erected under the same conditions, rules, etc. under which the Eagles' monument was and is permitted and maintained over the years.

Displaying our aphorisms along with the Ten Commandments would serve the public good and make the world a better place.

Thank you for your time and attention to this important matter. May I hear from you within ten (10) days?

/s/ Corky Ra
Summum Amon Ra
President

EXHIBIT B

SUMMUM

September 17, 2003

The Hon. Jim Danklet
Mayor
Pleasant Grove City Hall
70 South 100 East
Pleasant Grove, Utah 84062

Re: Religious Monuments

Dear Mayor Danklet:

I wrote to you on September 5, 2003 requesting permission to erect a monument in the City Park near and comparable to the Eagles' 10 Commandments Monument. The display of the Seven Aphorisms of SUMMUM will make Pleasant Grove and this world a better place in the same manner, as does the display of the 10 Commandments. The Aphorisms are complimentary to the Commandments.

I have not heard from you in response to that letter. I did read in the newspaper that you rejected our request. Unless I hear from you otherwise within seven (7) days of the date of this letter, I will sadly assume that the newspaper accurately reported your position and that of the City.

Thank you.

/s/ Corky Ra
Summum Bonum Amon Ra
President

EXHIBIT C

PLEASANT GROVE
A PLACE TO GROW

November 19, 2003

Summum Bonum Amon Ra
707 Genesee Avenue
Salt Lake City, UT 84104-1460

Re: Request to erect monument in Pleasant Grove

Dear Summum Bonum Amon Ra:

This is in response to your letter of September 17, 2003. The City of Pleasant Grove respectfully declines to grant the permission you request.

The park to which you refer does contain several structures, plaques, monuments and permanent signs all of which either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with long-standing ties to the Pleasant Grove community. These groups, such as the Boy Scouts, Eagles, and Volunteer Fire Department, have made valuable civic contributions to our city for many years. Thus, our practice — established over many decades — has been to limit

structures, displays, monuments, etc. to those which meet either or both of the foregoing criteria.

We have concluded that your group does not meet either of our criteria.

Very truly yours,

/s/ Jim A. Danklef
Jim A. Danklef
Pleasant Grove City Mayor

EXHIBIT D

SUMMUM

May 6, 2005

The Hon. Jim Danklet
Mayor
Pleasant Grove City Hall
70 South 100 East
Pleasant Grove, Utah 84062

Re: Religious Monuments

Dear Mayor Danklet:

I wrote to you on September 2003. A copy of my letter is attached hereto. I failed to receive a response from you.

As a reminder, SUMMUM would like to erect a monument in the City Park near 100 North 100 East. Our monument would be similar in size and nature to the monument donated and erected by the Fraternal Order of Eagles that contains the Ten Commandments.

Our stone monument would contain the Seven Aphorisms of SUMMUM and would be complementary in content and appearance to the Ten Commandments monument. Our monument would be erected under the same conditions, rules,

etc., under which the Eagles' monument was and is permitted and maintained over the years.

In light of your non-response to my letter of Sept. 2003, if I do not hear from you within 10 days of this letter, I will assume that our request is rejected.

Sincerely,

/s/ Corky Ra
Corky Ra
Summum

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Summum,	) Case No. 02:05-CV-0638-DB
Plaintiff,	)
	)
v.	) DEFENDANT G. KEITH
	) CORRY'S ANSWER TO
Pleasant Grove City,	) COMPLAINT
et al.	)
Defendants	) Chief Judge Dee Benson

Defendant, G. Keith Corry, by way of Answer to the Complaint, states as follows:

1. As to the allegations in paragraph 1 of the Complaint, G. Keith Corry admits that these are plaintiff's allegations and denies the validity of same.

2. As to the allegations in paragraph 2 of the Complaint, G. Keith Corry admits that these are plaintiff's allegations and denies the validity of same.

3. As to the allegations in paragraph 3 of the Complaint, G. Keith Corry admits the allegations in the first and third sentences of said paragraph. G. Keith Corry admits the allegations in the second sentence of said paragraph as they relate to him and is presently without sufficient knowledge or information to form a belief as to the truth of the other allegations in the second sentence of said paragraph and on that basis denies same.

4. As to the allegations in paragraph 4 of the Complaint, G. Keith Corry is presently without sufficient knowledge or information to form a belief as

to the truth of the allegations in paragraph 4 and on that basis denies them.

5. As to the allegations in paragraph 5 of the Complaint, G. Keith Corry admits that Jim Danklef is the Mayor of Pleasant Grove and denies the remaining allegations in said paragraph.

6. As to the allegations in paragraph 6 of the Complaint, G. Keith Corry admits that Frank Mills is the City Administrator of Pleasant Grove and denies the remaining allegations in said paragraph.

7. As to the allegations in paragraph 7 of the Complaint, G. Keith Corry admits that Mark Atwood, Cindy Boyd, Mike Daniels, Darold McDade, and Jeff Wilson are current members of the City Council of Pleasant Grove. G. Keith Corry admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (A true and correct copy of the City's letter to plaintiff dated November 19, 2003, is attached hereto as Exhibit 1, and a true and correct copy of Resolution No. 2004-019 is attached hereto as Exhibit 2.) G. Keith Corry denies that the Mayor or the City Administrator has a vote on the city council, and states that the Mayor may only cast a vote to break a tie of the city council.

8. As to the allegations in paragraph 8 of the Complaint, G. Keith Corry admits that Carol Harmer

and he were former city council members. G. Keith Corry states that he has not been a Pleasant Grove City elected official since leaving the position of city council member in or about January 2004. G. Keith Corry admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (Exhibits 1 & 2, hereto.) G. Keith Corry denies that the Mayor or the City Administrator has a vote on the city council, and states that the Mayor may only cast a vote to break a tie of the city council.

9. As to the allegations in paragraph 9 of the Complaint, G. Keith Corry admits as to the status of City, and denies that the City is the employer of the individual defendants, except for City Administrator Frank Mills. G. Keith Corry admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (Exhibits 1 &

2, hereto.) G. Keith Corry denies the remaining allegations in paragraph 9.

10. As to the allegations in paragraph 10 of the Complaint, G. Keith Corry admits that those are plaintiff's allegations and denies the validity of same. G. Keith Corry states that he has not been a Pleasant Grove City elected official since leaving the position of city council member in or about January 2004.

11. As to the allegations in paragraph 11 of the Complaint, G. Keith Corry admits that a Fraternal Order of Eagles monument containing a version of the Ten Commandments, among other recitations and symbols, has stood in a city park since 1971, and denies that the monument is in a prominent place or visible to the general public.

12. As to the allegations in paragraph 12 of the Complaint, G. Keith Corry admits same.

13. As to the allegations in paragraph 13 of the complaint, G. Keith Corry admits that the Ten Commandments are believed by Jews and Christians to be religious writings and instructions that form part of the basis of their religions, that certain religious teachings state that the Ten Commandments were personally and directly revealed by God to Moses as mandates of the Jewish faith, and that the Ten Commandments are referred to in the Bible. The remaining allegations of said paragraph require no response, and the scripture passages and case law citations referred to in said paragraph speak for themselves.

14. As to the allegations in paragraph 14 of the Complaint, G. Keith Corry admits same and states that the monument in question contains other symbols and/or recitations as well.

15. As to the allegations in paragraph 15 of the Complaint, G. Keith Corry admits that the City received a letter from plaintiff dated September 5, 2003, and the letter speaks for itself. G. Keith Corry is without sufficient knowledge or information to respond to the allegation regarding the appearance, size, and material of plaintiff's alleged monument and denies same.

16. As to the allegations in paragraph 16 of the Complaint, G. Keith Corry admits that the City did not respond to plaintiff's letter of September 5, 2003, but states that on or about November 19, 2003, it did respond to plaintiff's second letter dated September 17, 2003. (Exhibit 1, hereto; a true and correct copy of plaintiff's second letter dated September 17, 2003, is attached hereto as Exhibit 3.) G. Keith Corry denies the remaining allegations in paragraph 16 of the Complaint.

17. As to the allegations in paragraph 17 of the Complaint, G. Keith Corry denies same. As stated in paragraph 16 above, the second letter Pleasant Grove City received from plaintiff was dated September 17, 2003, to which the City responded on or about November 19, 2003. (Exhibits 1 & 3, hereto.) G. Keith Corry further states that under the terms of the alleged May 6, 2005, letter of plaintiff, which is attached as Exhibit B to the Complaint and which speaks for itself, no response was required.

18. As to the allegations in paragraph 18 of the Complaint, G. Keith Corry denies same and states that the City responded on or about November 19, 2003, to plaintiff's second letter dated September 17, 2003. G. Keith Corry further states that under the terms of the alleged May 6, 2005, letter of plaintiff, which is

attached as Exhibit B to the Complaint and which speaks for itself, no response was required.

19. As to the allegations in paragraph 19 of the Complaint, G. Keith Corry denies same.

20. As to the allegations in paragraph 20 of the Complaint, G. Keith Corry states that the allegations are not factual allegations, but statements of plaintiff's understanding of the law, and no response is required thereto.

21. As to the allegations in paragraph 21 of the Complaint, G. Keith Corry denies same.

22. As to the allegations in paragraph 22 of the Complaint, G. Keith Corry denies same.

23. As to the allegations in paragraph 23 of the Complaint, G. Keith Corry admits same as they relate to him and is presently without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in said paragraph and on that basis denies same.

STATUS OF THE LAW
OF THE TENTH CIRCUIT

24. As to the allegations in paragraph 24 of the Complaint, G. Keith Corry denies same.

25. As to the allegations in paragraph 25 of the Complaint, G. Keith Corry denies same.

CAUSES OF ACTION
FEDERAL FREE EXPRESSION CLAUSE

26. As to the allegations in paragraph 26 of the Complaint, G. Keith Corry incorporates herein his responses to all preceding allegations.

27. As to the allegations in paragraph 27 of the Complaint, G. Keith Corry denies same.

28. As to the allegations in paragraph 28 of the Complaint, G. Keith Corry denies same.

29. As to the allegations in paragraph 29 of the Complaint, G. Keith Corry denies same.

30. As to the allegations in paragraph 30 of the Complaint, G. Keith Corry denies same.

STATE FREE EXPRESSION CLAUSE

31. As to the allegations in paragraph 31 of the Complaint, G. Keith Corry incorporates herein his responses to all preceding allegations.

32. As to the allegations in paragraph 32 of the Complaint, G. Keith Corry denies same.

33. As to the allegations in paragraph 33 of the Complaint, G. Keith Corry denies same.

34. As to the allegations in paragraph 34 of the Complaint, G. Keith Corry denies same.

STATE ESTABLISHMENT CLAUSE

35. As to the allegations in paragraph 35 of the Complaint, G. Keith Corry incorporates herein his responses to all preceding allegations.

36. As to the allegations in paragraph 36 of the Complaint, G. Keith Corry denies same.

37. As to the allegations in paragraph 37 of the Complaint, G. Keith Corry denies same.

38. As to the allegations in paragraph 38 of the Complaint, G. Keith Corry denies same.

39. As to the allegations in paragraph 39 of the Complaint, G. Keith Corry denies same.

IMMEDIATE EQUITABLE RELIEF

40. As to the allegations in paragraph 40 of the Complaint, G. Keith Corry denies same.

41. As to the allegations in paragraph 41 of the Complaint, G. Keith Corry denies same.

DAMAGES

42. As to the allegations in paragraph 42 of the Complaint, G. Keith Corry denies same.

43. As to the allegations in paragraph 43 of the Complaint, G. Keith Corry admits same.

ATTORNEY FEES AND COSTS

44. As to the allegations in paragraph 44 of the Complaint, G. Keith Corry denies same.

45. As to the allegations in paragraph 45 of the Complaint, G. Keith Corry denies same.

DEMAND FOR RELIEF

46. G. Keith Corry denies that plaintiff is entitled to any relief sought in paragraphs 1, 2, 3, 4, 5, and 6 of the "Demand for Relief" section of plaintiff's Complaint.

GENERAL DENIAL

47. Any allegation not specifically admitted in this Answer is hereby denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted against G. Keith Corry.

SECOND AFFIRMATIVE DEFENSE

This court lacks subject matter jurisdiction over this action.

THIRD AFFIRMATIVE DEFENSE

Plaintiff lacks standing to pursue this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part as G. Keith Corry did not violate any constitutional, statutory, or common law rights, privilege, or immunity of plaintiff.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims against G. Keith Corry are barred in whole or in part as G. Keith Corry's actions were not

pursuant to any unconstitutional policy, practice, custom, usage, rule, or regulation.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against G. Keith Corry are barred in whole or in part because plaintiff has suffered no compensable injury or damage as a result of the conduct of G. Keith Corry.

EIGHTH AFFIRMATIVE DEFENSE

To the extent plaintiff has failed to mitigate its damages, if any, any potential recovery under such claims advanced by plaintiff's Complaint should be barred or appropriately reduced.

NINTH AFFIRMATIVE DEFENSE

Plaintiff has failed to plead with specificity the special damages it claims in this action. Fed. R. Civ. P. 9(g).

TENTH AFFIRMATIVE DEFENSE

Plaintiff cannot obtain punitive damages from Pleasant Grove City, a municipality, or from any defendant sued in his or her official capacity. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff failed to comply with the procedures of Resolution No. 2004-019 and failed to exhaust all administrative remedies.

TWELFTH AFFIRMATIVE DEFENSE

G. Keith Corry's actions have at all times complied with the First Amendment of the United States Constitution and Article I, section 4 of the Utah Constitution.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part as any and all actions or inactions on the part of G. Keith Corry did not violate clearly established law, were objectively reasonable, and therefore G. Keith Corry is entitled to qualified immunity from suit.

FOURTEENTH AFFIRMATIVE DEFENSE

G. Keith Corry is entitled to absolute and/or legislative immunity as to all claims against him.

FIFTEENTH AFFIRMATIVE DEFENSE

G. Keith Corry states that he has or may have further and additional affirmative defenses that are not yet known, which may become known through future discovery. G. Keith Corry asserts each and every affirmative defense as it may be ascertained through future discovery in this matter.

WHEREFORE, defendant G. Keith Corry prays that plaintiff's Complaint be dismissed with prejudice and that plaintiff takes nothing by it, and for such other and further relief as may be appropriate under the circumstances, including attorneys' fees and costs.

Respectfully submitted on this 26th day of October, 2005.

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(734) 827-2001
*Pro hac vice application granted

Counsel for defendants Pleasant Grove City, Jim Danklef, and G. Keith Corry

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Summum,	) Case No. 02:05-CV-0638-DB
Plaintiff,	)
	)
v.	) DEFENDANT FRANK
	) MILLS ANSWER TO
Pleasant Grove City,	) COMPLAINT
et al.	)
Defendants.	) Chief Judge Dee Benson

Defendant, Frank Mills, City Administrator, by way of Answer to the Complaint, states as follows:

1. As to the allegations in paragraph 1 of the Complaint, Frank Mills admits that these are plaintiff's allegations and denies the validity of same.

2. As to the allegations in paragraph 2 of the Complaint, Frank Mills admits that these are plaintiff's allegations and denies the validity of same.

3. As to the allegations in paragraph 3 of the Complaint, Frank Mills admits the allegations in the first and third sentences of said paragraph. Frank Mills admits the allegations in the second sentence of said paragraph as they relate to him and is presently without sufficient knowledge or information to form a belief as to the truth of the other allegations in the second sentence of said paragraph and on that basis denies same.

4. As to the allegations in paragraph 4 of the Complaint, Frank Mills is presently without sufficient knowledge or information to form a belief as to the

truth of the allegations in paragraph 4 and on that basis denies them.

5. Admitted that Jim Danklef is the Mayor of Pleasant Grove; remaining allegations in said paragraph denied.

6. As to the allegations in paragraph 6 of the Complaint, Frank Mills admits that he is the City Administrator of Pleasant Grove and denies the remaining allegations in said paragraph.

7. As to the allegations in paragraph 7 of the Complaint, Frank Mills admits that Mark Atwood, Cindy Boyd, Mike Daniels, Darold McDade, and Jeff Wilson are current members of the City Council of Pleasant Grove. Frank Mills admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (A true and correct copy of the City's letter to plaintiff dated November 19, 2003, is attached hereto as Exhibit 1, and a true and correct copy of Resolution No. 2004-019 is attached hereto as Exhibit 2.) Frank Mills denies that he or the Mayor has a vote on the city council, and states that the Mayor may only cast a vote to break a tie of the city council.

8. As to the allegations in paragraph 8 of the Complaint, Frank Mills admits that Carol Harmer and G. Keith Corry were former city council members.

Frank Mills states that he has not been a Pleasant Grove City elected official since leaving the position of city council member in or about January 2004. Frank Mills admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (Exhibits 1 & 2, hereto.) Frank Mills denies that he or the Mayor has a vote on the city council and states that the Mayor may only cast a vote to break a tie of the city council.

9. As to the allegations in paragraph 9 of the Complaint, Frank Mills admits as to the status of City, and denies that the City is the employer of the individual defendants, except for City Administrator Frank Mills. Frank Mills admits that the city council members have the collective administrative power to determine whether and who will be allowed to place monuments, symbols, or displays on government property belonging to Pleasant Grove as based on the City's practice, established over many decades, that considers the direct relation to the history of Pleasant Grove and the historical relevance to the community, as explained in the City's letter to plaintiff, dated November 19, 2003, and on Resolution No. 2004-019, effective August 3, 2004. (Exhibits 1 & 2, hereto.) Frank Mills denies the remaining allegations in paragraph 9.

10. As to the allegations in paragraph 10 of the Complaint, Frank Mills admits that those are plaintiff's allegations and denies the validity of same. Frank Mills states that he has not been a Pleasant Grove City elected official since leaving the position of city council member in or about January 2004.

11. As to the allegations in paragraph 11 of the Complaint, Frank Mills admits that a Fraternal Order of Eagles monument containing a version of the Ten Commandments, among other recitations and symbols, has stood in a city park since 1971, and denies that the monument is in a prominent place or visible to the general public.

12. As to the allegations in paragraph 12 of the Complaint, Frank Mills admits same.

13. As to the allegations in paragraph 13 of the Complaint, Frank Mills admits that the Ten Commandments are believed by Jews and Christians to be religious writings and instructions that form part of the basis of their religions, that certain religious teachings state that the Ten Commandments were personally and directly revealed by God to Moses as mandates of the Jewish faith, and that the Ten Commandments are referred to in the Bible. The remaining allegations of said paragraph require no response, and the scripture passages and case law citations referred to in said paragraph speak for themselves.

14. As to the allegations in paragraph 14 of the Complaint, Frank Mills admits same and states that the monument in question contains other symbols and/or recitations as well.

15. As to the allegations in paragraph 15 of the Complaint, Frank Mills admits that the City received

a letter from plaintiff dated September 5, 2003, and the letter speaks for itself. Frank Mills is without sufficient knowledge or information to respond to the allegation regarding the appearance, size, and material of plaintiff's alleged monument and denies same.

16. As to the allegations in paragraph 16 of the Complaint, Frank Mills admits that the City did not respond to plaintiff's letter of September 5, 2003, but states that on or about November 19, 2003, it did respond to plaintiff's second letter dated September 17, 2003. (Exhibit 1, hereto; a true and correct copy of plaintiff's second letter dated September 17, 2003, is attached hereto as Exhibit 3.) Frank Mills denies the remaining allegations in paragraph 16 of the Complaint.

17. As to the allegations in paragraph 17 of the Complaint, Frank Mills denies same. As stated in paragraph 16 above, the second letter Pleasant Grove City received from plaintiff was dated September 17, 2003, to which the City responded on or about November 19, 2003. (Exhibits 1 & 3, hereto.) Frank Mills further states that under the terms of the alleged May 6, 2005, letter of plaintiff, which is attached as Exhibit B to the Complaint and which speaks for itself, no response was required.

18. As to the allegations in paragraph 18 of the Complaint, Frank Mills denies same and states that the City responded on or about November 19, 2003, to plaintiff's second letter dated September 17, 2003. Frank Mills further states that under the terms of the alleged May 6, 2005, letter of plaintiff, which is attached as Exhibit B to the Complaint and which speaks for itself, no response was required.

19. As to the allegations in paragraph 19 of the Complaint, Frank Mills denies same.

20. As to the allegations in paragraph 20 of the Complaint, Frank Mills states that the allegations are not factual allegations, but statements of plaintiff's understanding of the law, and no response is required thereto.

21. As to the allegations in paragraph 21 of the Complaint, Frank Mills denies same.

22. As to the allegations in paragraph 22 of the Complaint, Frank Mills denies same.

23. As to the allegations in paragraph 23 of the Complaint, Frank Mills admits same as they relate to him and is presently without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in said paragraph and on that basis denies same.

STATUS OF THE LAW OF THE TENTH CIRCUIT

24. As to the allegations in paragraph 24 of the Complaint, Frank Mills denies same.

25. As to the allegations in paragraph 25 of the Complaint, Frank Mills denies same.

CAUSES OF ACTION FEDERAL FREE EXPRESSION CLAUSE

26. As to the allegations in paragraph 26 of the Complaint, Frank Mills incorporates herein his responses to all preceding allegations.

27. As to the allegations in paragraph 27 of the Complaint, Frank Mills denies same.

28. As to the allegations in paragraph 28 of the Complaint, Frank Mills denies same.

29. As to the allegations in paragraph 29 of the Complaint, Frank Mills denies same.

30. As to the allegations in paragraph 30 of the Complaint, Frank Mills denies same.

STATE FREE EXPRESSION CLAUSE

31. As to the allegations in paragraph 31 of the Complaint, Frank Mills incorporates herein his responses to all preceding allegations.

32. As to the allegations in paragraph 32 of the Complaint, Frank Mills denies same.

33. As to the allegations in paragraph 33 of the Complaint, Frank Mills denies same.

34. As to the allegations in paragraph 34 of the Complaint, Frank Mills denies same.

STATE ESTABLISHMENT CLAUSE

35. As to the allegations in paragraph 35 of the Complaint, Frank Mills incorporates herein his responses to all preceding allegations.

36. As to the allegations in paragraph 36 of the Complaint, Frank Mills denies same.

37. As to the allegations in paragraph 37 of the Complaint, Frank Mills denies same.

38. As to the allegations in paragraph 38 of the Complaint, Frank Mills denies same.

39. As to the allegations in paragraph 39 of the Complaint, Frank Mills denies same.

IMMEDIATE EQUITABLE RELIEF

40. As to the allegations in paragraph 40 of the Complaint, Frank Mills denies same.

41. As to the allegations in paragraph 41 of the Complaint, Frank Mills denies same.

DAMAGES

42. As to the allegations in paragraph 42 of the Complaint, Frank Mills denies same.

43. As to the allegations in paragraph 43 of the Complaint, Frank Mills admits same.

ATTORNEY FEES AND COSTS

44. As to the allegations in paragraph 44 of the Complaint, Frank Mills denies same.

45. As to the allegations in paragraph 45 of the Complaint, Frank Mills denies same.

DEMAND FOR RELIEF

46. Frank Mills denies that plaintiff is entitled to any relief sought in paragraphs 1, 2, 3, 4, 5, and 6 of the "Demand for Relief" section of plaintiff's Complaint.

GENERAL DENIAL

47. Any allegation not specifically admitted in this Answer is hereby denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted against Frank Mills.

SECOND AFFIRMATIVE DEFENSE

This court lacks subject matter jurisdiction over this action.

THIRD AFFIRMATIVE DEFENSE

Plaintiff lacks standing to pursue this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part as Frank Mills did not violate any constitutional, statutory, or common law rights, privilege, or immunity of plaintiff.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims against Frank Mills are barred in whole or in part as Frank Mills actions were not pursuant to any unconstitutional policy, practice, custom, usage, rule, or regulation.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against Frank Mills are barred in whole or in part because plaintiff has suffered no compensable injury or damage as a result of the conduct of Frank Mills.

EIGHTH AFFIRMATIVE DEFENSE

To the extent plaintiff has failed to mitigate its damages, if any, any potential recovery under such claims advanced by plaintiff's Complaint should be barred or appropriately reduced.

NINTH AFFIRMATIVE DEFENSE

Plaintiff has failed to plead with specificity the special damages it claims in this action. Fed. R. Civ. P. 9(g).

TENTH AFFIRMATIVE DEFENSE

Plaintiff cannot obtain punitive damages from Pleasant Grove City, a municipality, or from any defendant sued in his or her official capacity. *See, e.g., Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985); *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 271 (1981).

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff failed to comply with the procedures of Resolution No. 2004-019 and failed to exhaust all administrative remedies.

TWELFTH AFFIRMATIVE DEFENSE

Frank Mills' actions have at all times complied with the First Amendment of the United States Constitution and Article I, section 4 of the Utah Constitution.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part as any and all actions or inactions on the part of Frank Mills did not violate clearly established law, were objectively reasonable, and therefore Frank Mills is entitled to qualified immunity from suit.

FOURTEENTH AFFIRMATIVE DEFENSE

Frank Mills is entitled to absolute and/or legislative immunity as to all claims against him.

FIFTEENTH AFFIRMATIVE DEFENSE

Frank Mills states that he has or may have further and additional affirmative defenses that are not yet known, which may become known through future discovery. Frank Mills asserts each and every affirmative defense as it may be ascertained through future discovery in this matter.

WHEREFORE, defendant Frank Mills prays that plaintiff's Complaint be dismissed with prejudice and that plaintiff takes nothing by it, and for such other and further relief as may be appropriate under the circumstances, including attorneys' fees and costs.

Respectfully submitted on this 9th day of November, 2005.

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Counsel for defendants Pleasant Grove City, et al.

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Summum,	) Case No.
	) 02:05-CV-0638 DB
	)
v.	) DEFENDANTS'
	) MEMORANDUM
Pleasant Grove City,	) IN OPPOSITION
et al.	) TO PLAINTIFF'S
Defendants.	) MOTION FOR
	) PARTIAL
	) SUMMARY
	) JUDGMENT
	)

***

RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

Pursuant to DUCivR 56-1(c), the defendants submit the following response to plaintiff's Statement of Undisputed Facts.

1. Plaintiff's first paragraph is not a statement of fact but a series of legal conclusions to which no response is required.

2. Undisputed.

3. Without the benefit of any discovery, the defendants are not in a position to say whether the allegations of plaintiff's ¶ 3 are true.

4. The defendants partially dispute plaintiff's ¶ 4. The mayor does not have the power ascribed to him by plaintiff. Danklef Answer, Doc. #8, ¶¶ 5, 7.

5. Defendants partially dispute plaintiff's ¶ 5. Defendant Mills does not have the power ascribed to him by plaintiff. Mills Answer, #18, ¶ 6.

6. Undisputed. Pleasant Grove Answer, Doc. #14, ¶ 7.

7. Undisputed. Pleasant Grove Answer, Doc. #14, ¶ 8.

8. Partially disputed. The city is not the employer of the individual defendants, except for defendant Mills.

9. Partially disputed. The city denies that the monument is in a "prominent place." *See attached,* Mills Declaration, Exhibit G-1.

10. Undisputed.

11. Partially disputed. Pleasant Grove Answer, Doc. #14, ¶ 13.

12. Undisputed.

13. Partially disputed. The defendants have never seen a picture, diagram, sketch or artist's rendering of Summum's monument. Pleasant Grove Answer, Doc. #14, ¶ 15.

14. Undisputed.

15. Partially disputed. Defendants did respond by letter dated November 19, 2003. Pleasant Grove Answer, Doc. #14, ¶ 16.

16. Undisputed. Pleasant Grove Answer, Doc. #14, ¶ 16.

17. Undisputed.

18. Undisputed.

19. This is a legal conclusion to which no response is required. As to the accuracy of plaintiff's

conclusions and their applicability to the undisputed facts of record, *see* defendants' "Argument" *infra*.

20. This is a legal conclusion to which no response is required. As to the accuracy of plaintiff's conclusions and their applicability to the undisputed facts of record, *see* defendants' "Argument" *infra*.

21. This is a legal conclusion to which no response is required. As to the accuracy of plaintiff's conclusions and their applicability to the undisputed facts of record, *see* defendants' "Argument" *infra*.

22. This is a legal conclusion to which no response is required. As to the accuracy of plaintiff's conclusions and their applicability to the undisputed facts of record, *see* defendants' "Argument" *infra*.

23. This is a legal conclusion to which no response is required. As to the accuracy of plaintiff's conclusions and their applicability to the undisputed facts of record, *see* defendants' "Argument" *infra*.

24. This is a legal conclusion to which no response is required. As to the accuracy of plaintiff's conclusions and their applicability to the undisputed facts of record, *see* defendants' "Argument" *infra*.

25. This is a legal conclusion to which no response is required. As to the accuracy of plaintiff's conclusions and their applicability to the undisputed facts of record, *see* defendants' "Argument" *infra*.

26. This is a legal conclusion to which no response is required. As to the accuracy of plaintiff's conclusions and their applicability to the undisputed facts of record, *see* defendants' "Argument" *infra*.

27. This is a legal conclusion to which no response is required. As to the accuracy of plaintiff's conclusions and their applicability to the undisputed facts of record, *see* defendants' "Argument" *infra*.

28. This is a legal conclusion to which no response is required. As to the accuracy of plaintiff's conclusions and their applicability to the undisputed facts of record, *see* defendants' "Argument" *infra*.

***

Respectfully submitted on this 14th day of November, 2005.

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*Admitted pro hac vice

Counsel for defendants Pleasant Grove City, et al.

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Summum,	)	
	)	Case No.
Plaintiff,	)	02:05-CV-0638-DB
	)	
v.	)	Chief Judge
	)	Dee Benson
	)	
Pleasant Grove City, et al.	)	DECLARATION OF TERRY CARLSON
	)	
Defendants.	)	

I, Terry Carlson, make the following Declaration in Lieu of Affidavit:

1. I am the Past Worthy President of the Fraternal Order of Eagles Pleasant Grove Aerie #3372 and State Chaplain of the Utah State Chapter.

2. The Fraternal Order of Eagles (hereafter "FOE") is not a religious organization. We are a fraternal, social service organization. Our motto is "Eagles are People Helping People."

3. The FOE was started in 1898 in Seattle, Washington. The organization has been the impetus for a number of hallmarks of modern American life which most people take for granted including Mother's Day, old age pension laws, Social Security, and laws against age discrimination in employment. One of the most prominent early FOE members was Frank Hering (who, incidentally was also the first football coach at the University of Notre Dame) who was

proclaimed by the Society of American War Mothers as "the Father of Mother's Day."

4. President Franklin D. Roosevelt, on the occasion of the signing of the Social Security Act, praised the FOE for its contribution to the enactment of this legislation, saying: "I have long observed with satisfaction the sponsorship by the F.O.E. of social justice legislation both in the states and in the nation."

5. President Lyndon B. Johnson recognized the FOE's role in the passage of the "Jobs After 40" legislation outlawing upper age limits in hiring: "The Eagles started this whole idea. That is why I invited the Eagles to be at this private bill signing, and the reason I am presenting this pen to the Fraternal Order of Eagles." Johnson also praised the FOE (and presented them another pen) when he signed the law creating Medicare: "For your energetic and dedicated espousal of social justice, and for the generous support you have given to all measures designed to further economic opportunity and the compassionate treatment of the sick and disabled."

6. Seven U.S. Presidents have been members of the FOE: T. Roosevelt, Harding, F. D. Roosevelt, Truman, Kennedy, Carter and Reagan.

7. The local Eagles club began in American Fork, Utah in 1968. The club moved its meeting hall to Pleasant Grove about a year later. It has been located at 200 North 600 West, Pleasant Grove, Utah 84062 since sometime in 1969.

8. The Eagles of Pleasant Grove have been involved in many fundraisers over the years and performed thousands of hours of community service. Some of the activities include: raising money to provide active military personnel get phone cards; raising

money for the needy of Pleasant Grove at Christmas time; putting up flags in the cemetery to honor the soldiers; and providing many man hours of labor for the new memorial gardens at the city cemetery.

9. The Pleasant Grove Aerie has been involved with the local Strawberry Days Celebration since 1986. The Eagles provide free strawberries and cream as a community service. The first year they provided 100 cases of berries, last year over 700 cases of berries were cut and served in a four day period. The Eagles also provide service during the community celebration to raise funds for their scholarship program. They sell food and drinks at the fair and use the money raised to fund a scholarship at the local state college, Utah Valley State College. They have been doing this service for many years.

10. The Aerie also provides many other services for the citizens of Pleasant Grove. They held a community Easter Egg Hunt at the rodeo grounds for about 30 years. They color thousands of eggs each year for this event. About 3 years ago the Eagles needed some assistance to continue the hunt because the city had grown too large for them to do it on their own. They now cooperate with the City to provide this community event at a local park. The Eagles have also sponsored an evening where children can meet Santa each year since 1968. This event is open to the public.

11. Over the years, the Pleasant Grove Eagles have donated to what is called the "Big 6" charities that the Grand Aerie supports. These are: Jimmy Durante Children's Fund, Max Baer Heart Fund; Art Ehrmann Cancer Fund, the Golden Eagles (Seniors); the Kidney Fund and the Diabetes Fund. The Eagles have given from $200.00 to $500.00 to each of these

charities every year. The Eagles also donate to the Easter Seal Foundation, the Memorial Foundation and the Lew Reed Spinal Cord Injury Fund. All monies raised by the Eagles for these charities are donated. There are no overhead or administrative costs retained by the local Aerie.

12. The Pleasant Grove Eagles also sponsor fundraisers for Christmas Charities that provide Christmas for local needy families. They raise money all year to donate for Christmas. They have spent up to $10,000.00 to buy Christmas for needy families in the area. Each year the Eagles also sponsor a local student from Pleasant Grove High School to receive a scholarship equal to the cost of one year's tuition and books.

13. Over the years the Pleasant Grove Eagles have given grant monies to the Pleasant Grove Fire Department to purchase a heart monitor. These donations have amounted to approximately $5,000.00. They have also given grant monies to the local hospital of about $2,000.00, $1,000.00 to the local elementary schools to provide services for the hearing impaired, the Pleasant Grove Library and many other donations for groups in the local area. The Eagles have also sponsored many fundraisers over the years for individuals with special needs.

14. During the 1950s and 60s, FOE aeries across the country donated to cities and towns stone Ten Commandments monuments such as the one at issue in this case. These donations were made as part of the FOE's Youth Guidance Project. This was a project started by a Minnesota juvenile court judge (and an Eagle) who thought it would be useful for our young people to understand that civilized societies have

always had rules of conduct and that the Ten Commandments were perhaps the best known set of such rules. The project was given a boost by Hollywood movie producer, C. B. DeMille, whose film "The Ten Commandments" came out around the same time.

15. The Pleasant Grove monument was donated by our state chapter. It was unveiled in May, 1971, at a ceremony in connection with the 61st FOE convention which took place in Provo that year. Mayor Cook and County Commissioner Roberts accepted the monument from FOE president A. G. Bench. Mayor Cook said he felt the monument "would serve to remind citizens of their pioneer heritage in the founding of the state."

16. The Pleasant Grove Eagles motto is "People Helping People." The Eagles have worked with the City of Pleasant Grove for over 35 years and plan to continue to do so for many years to come.

VERIFICATION

Declaration of Terry Carlson in Lieu of Affidavit pursuant to 28 U.S.C. § 1746:

I declare, under penalty of perjury under the laws of the United States that the foregoing statements are true and correct.

Executed November 14, 2005.

/s/Terry Carlson

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Summum,	) Case No.
Plaintiff,	) 02:05-CV-0638-DB
	)
v.	) Chief Judge
	) Dee Benson
Pleasant Grove City,	)
et. al	) DECLARATION
Defendants.	) OF
	) FRANK MILLS
	)

Frank Mills, makes the following Declaration in Lieu of Affidavit:

1. I am the city administrator of Pleasant Grove, Utah. I have held this position since 1998.

2. I have also held the following positions in Pleasant Grove city government: City Councilman, 1972-1980; Building Inspector, 1983-1985; Public Works Director 1984-2000; City Administrator, 1998-present.

3. I have lived my entire life in Pleasant Grove. As a lifelong resident as well as a part of city government for most of the past thirty-five years, I am familiar with the city' practices regarding accepting donations and displaying them on city property.

4. The Eagles Ten Commandments monument that is the subject of this lawsuit stands in a city park known as "Pioneer Park." The park consists of 2.5

acres of land bordered by 100 South and 100 East Streets.

5. Pioneer Park is located within the Pleasant Grove Historic District.

6. Pioneer Park contains the following buildings, plaques, monuments, trees and objects:

A. *Old Bell School* — This is the oldest known school building still standing in Utah. The three sections of the building were constructed in 1864, 1880, and 1887. At present, the entire structure is used to house the historical museum of the Daughters of Utah Pioneers. Listed on National Register of Historic Places in 1980. *See* Exhibit B-1, Exhibit B-2.

B. *First City Hall* — The original Pleasant Grove Town Hall was built in 1886 of locally quarried tufa rock. The building ceased being used as a town hall in 1940. Listed on National Register of Historic Places in 1985. *See* Exhibit C.

C. *The Winter Corral* — This winter sheepfold with its east, west, and north solid-rock walls portrays the pioneer ingenuity of using materials at hand to meet their needs. In 1999, this structure was dismantled and rebuilt rock by rock by the Pleasant Grove Historic Preservation Commission working with the Pleasant Grove Youth City Council and Youth City Court. *See* Exhibit D.

D. *Pleasant Grove's First Fire Station and Plaque* — A plaque commemorates the city's first fire

station, a small false-front shed built in 1912 to house the fire hoses and hand-pulled cart that carried the hoses to fires. *See* Exhibit E-1, Exhibit E-2.

E. *September 11 Monument* — A freestanding brick monument containing a picture of firefighters at the World Trade Center site in New York. The plaque recognizes "our Police Officers, Fire Fighters, Emergency Medical Personnel and the members of the Armed Forces . . ." The monument was the Eagle Project of Rick Best and Troop 123 with the support of Pleasant Grove Fire Fighters and several local businesses. *See* Exhibit F.

F. *Ten Commandments Monument* — Stone monument containing a version of the Ten Commandments along with various symbols. Donated by the Fraternal Order of Eagles in 1971 by the Utah State Aerie of the FOE. *See* Exhibit G-1, Exhibit G-2.

G. *Nauvoo Temple Stone* — Granite stone from the Mormon Temple in Nauoo, Illinois. Donated by John Huntsman to Pleasant Grove in June, 1978. John Huntsman was a lifelong resident of Pleasant Grove. He worked as a police officer, and also served on the city council. He was well known for his ability to match the historic stucco finishes used on the early building's in the area. He was asked to go and help restore some of the building's in Nauvoo, Illinois and while there he was able to get a stone from the Temple. He brought it back

as a gift to the city. This stone commemorates a significant landmark in the history of the predominantly Mormon original settlers of Pleasant Grove. *See* Exhibit H-1, Exhibit H-2.

H. *Gingko Tree and Plaque* — Tree planted in appreciation to Bill Hogland Bill Hogland served as the City Parks and Recreation Director for over 20 years. He worked full time for Geneva Steel and part time for the city. After his retirement from Geneva Steel he came to work full time for the city. Through his efforts Pleasant Grove's Parks and Recreation Programs became one of the best in the state. Donated by Pleasant Grove Youth City Court/Council and 4-H.

I. *Roses* — In memory of Jess and Elaine Walker. Jess and Elaine Walker were long time residents of Pleasant Grove and worked very hard to keep the Garden Club organized. They loved to work with roses and helped make our city grounds beautiful. *See* Exhibit I.

J. Log Cabin — Built in 1930 in the Downtown Park. In 1946 the cabin was moved to the newly established Pioneer Park. *See* Exhibit J.

K. *Wishing Well* — Donated by Lions Club in 1946. *See* Exhibit K.

L. *Granary* — Originally built in 1874. It was moved from Nelson family farmstead in 1993. *See* Exhibit L.

M. *Rocky Mountain Maple Tree and Plaque* — Donated by Pleasant Grove Youth City Court/Council and 4-H.

N. *Pioneer Flour Mill* — Donated in 1967. The Flour Mill Stone was given to the city by Mr. Joe Davis. It's the stone used in the first Flour Mill in town. The mill stood on his land in Pleasant Grove. *See* Exhibit M.

O. *First Log Cabin* — Donated by Joe Spencer in September, 2005.

P. *Park Benches* — Donated by Pleasant Grove Garden Club in 1977.

7. It has been the practice of the City of Pleasant Grove for decades to accept for display only artifacts, historic buildings, monuments, plaques, etc. which have some historical significance to our community or were donated by individuals or organizations with well established Pleasant Grove connections.

8. Every item in Pioneer Park has some connection to the settlement, history or cultural life of Pleasant Grove, past and present, or was donated by individuals or groups with longstanding ties to this community. It has never been the intent or the practice of the city to allow displays in the park that fail to meet either of these criteria.

9. For example, such things as the Old Bell School, the Winter Corral, and the First City Hall have obvious historical significance. Other items of less obvious historical relevance such as the Gingko tree and the Wishing Well were donated by civic groups

such as the Youth City Court/Council, 4-H, and the Lions Club. These are groups that have made and continue to make important contributions to Pleasant Grove.

10. Regarding the Eagles Ten Commandments monument, to my knowledge it was given to the city in 1971. The unveiling ceremony took place in connection with the Fraternal Order of Eagles sixty-first convention, held in Provo. The gift was accepted by Mayor Jack Cook and Utah County Commissioners Stanley Roberts. At the unveiling ceremony, Mayor Cook said he thought the monument "would serve to remind citizens of their pioneer heritage in the founding of the state." *See* Exhibit N, newspaper article.

11. The Fraternal Order of Eagles has been a valuable part of the Pleasant Grove community for many decades. The local club started in American Fork in 1968 and moved to its current location in Pleasant Grove in 1969.

12. The Pleasant Grove FOE has provided thousands of hours of community service and raised thousands of dollars for worthy causes in this community. The scope of their contributions has been vast, ranging from conducting the Easter Egg Hunt for 30 years, assisting with the Strawberry Days Celebration, buying Christmas presents for the needy, raising money for numerous charities, donating money to the Pleasant Grove Fire Department, the local hospital and elementary schools.

13. When the city received the request by plaintiff Summum to install its Seven Aphorisms monument in Pioneer Park, the request was evaluated in accordance with the decades-old criteria for accepting and

displaying such donations. The city was not and is not aware of any historical connection between Summum and Pleasant Grove's history, culture, or community. Nor was the city aware of any ties whatsoever between Summum or any of its members and our community. Accordingly, the city denied Summum's request.

14. Some time after receiving Summum's request, the city saw fit to put in writing its decades-old policy regarding such donations. Accordingly, on August 3, 2004, the City Council approved and adopted Resolution No. 2004-019, "A Policy Governing Placement of Plaques, Structures, Displays, Permanent Signs and Monuments in City Parks and on Public Property." Exhibit A.

15. Summum's later request, May 6, 2005, was evaluated according to the foregoing policy and rejected for the same reasons the first request was rejected: it failed to meet the criteria of historical relevance to Pleasant Grove and was not being donated by "an established Pleasant Grove civic organization with strong ties to the community." Exhibit A, § II, 1 and 2.

VERIFICATION

Declaration of Frank Mills in Lieu of Affidavit pursuant to 28 U.S.C. § 1746:

I declare, under penalty of perjury under the laws of the United States that the foregoing statements are true and correct.

Executed November 14, 2005.

/s/Frank Mills

Exhibit B-1

Best Available Copy

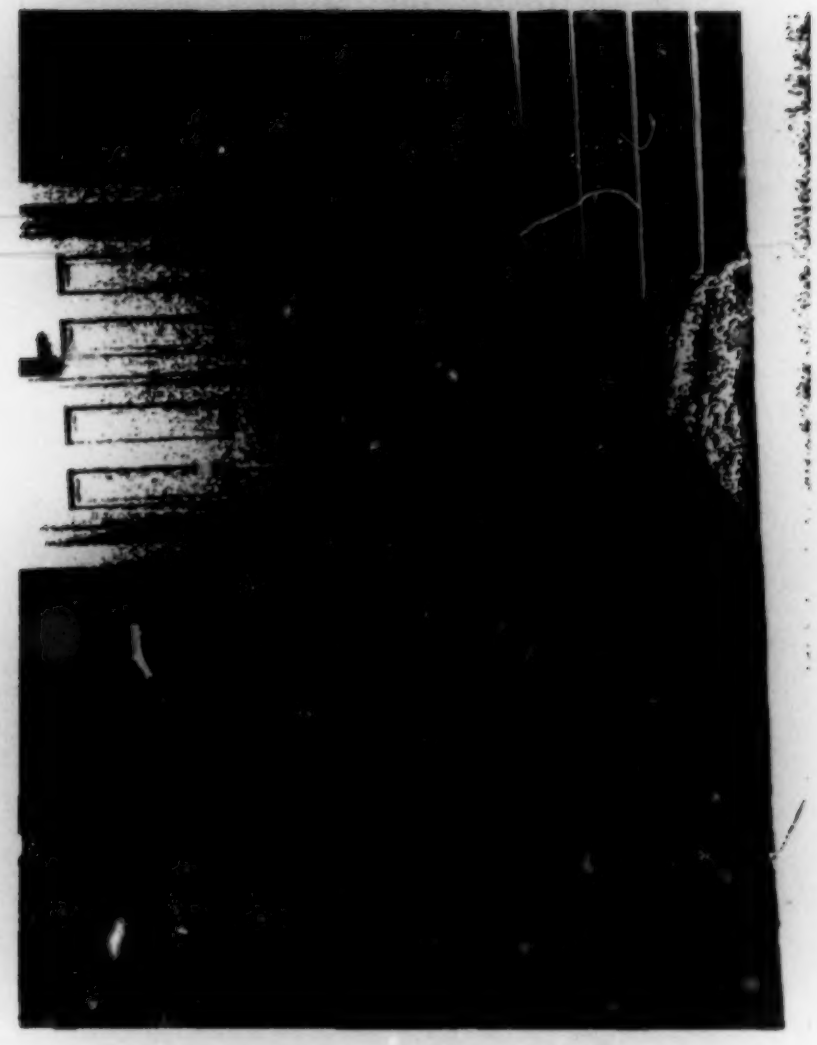

Exhibit B-2

Exhibit C

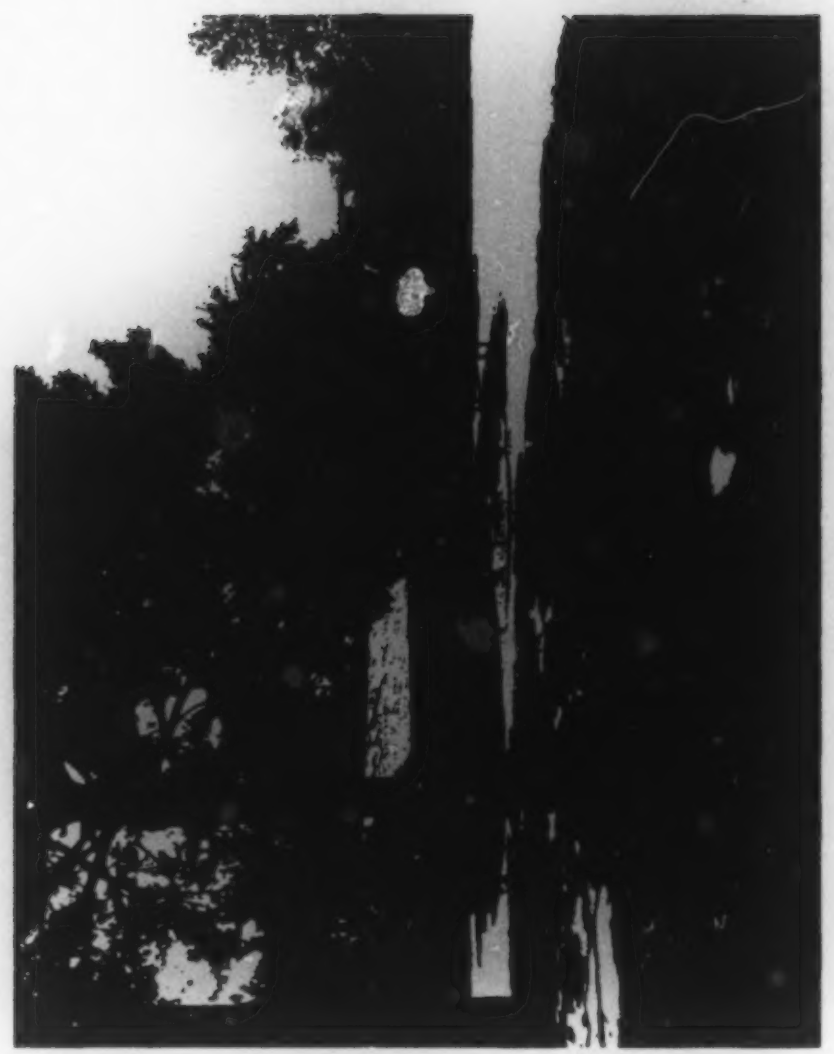

Exhibit D

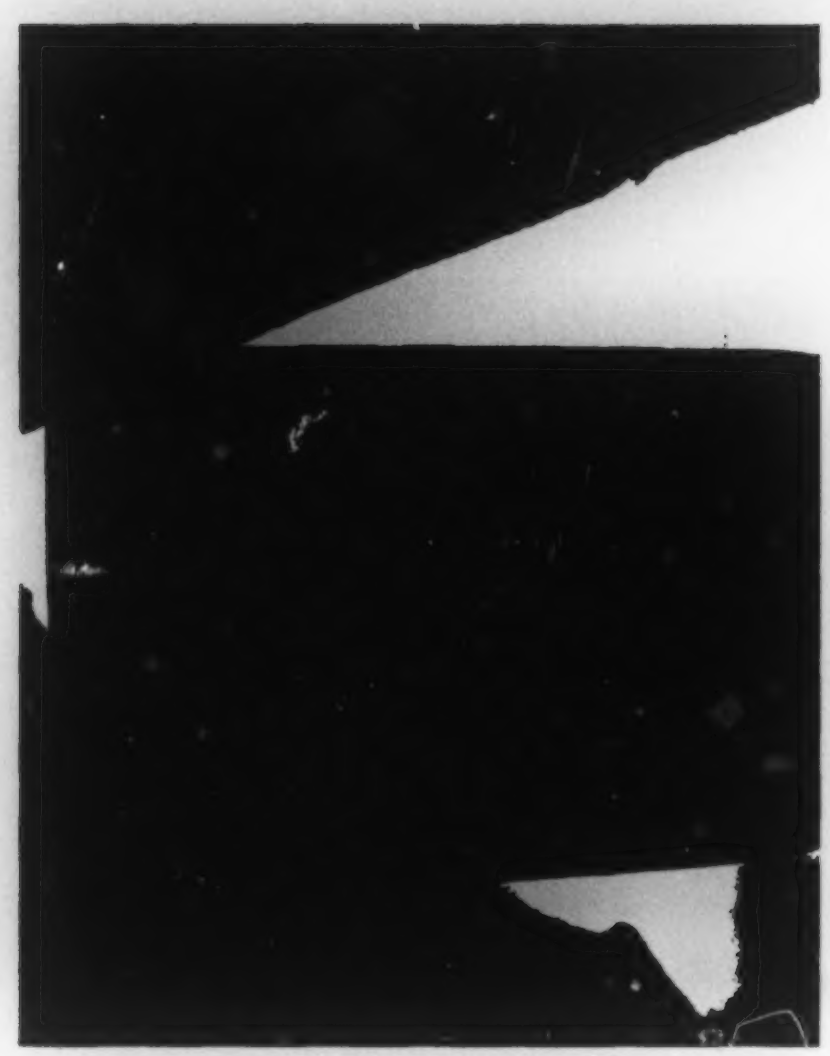

Exhibit E-1

Exhibit E-2

Exhibit F

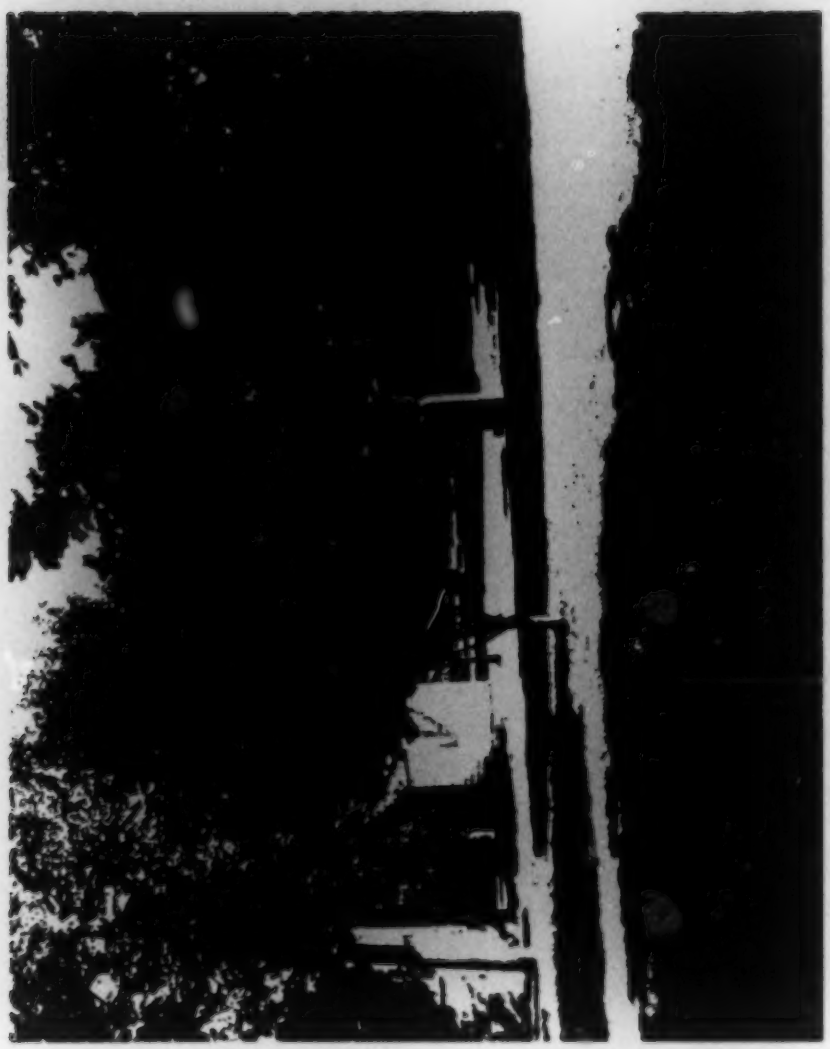

Exhibit G-1

Exhibit G-2

Exhibit H-1

Exhibit H-2

Exhibit I

Exhibit J

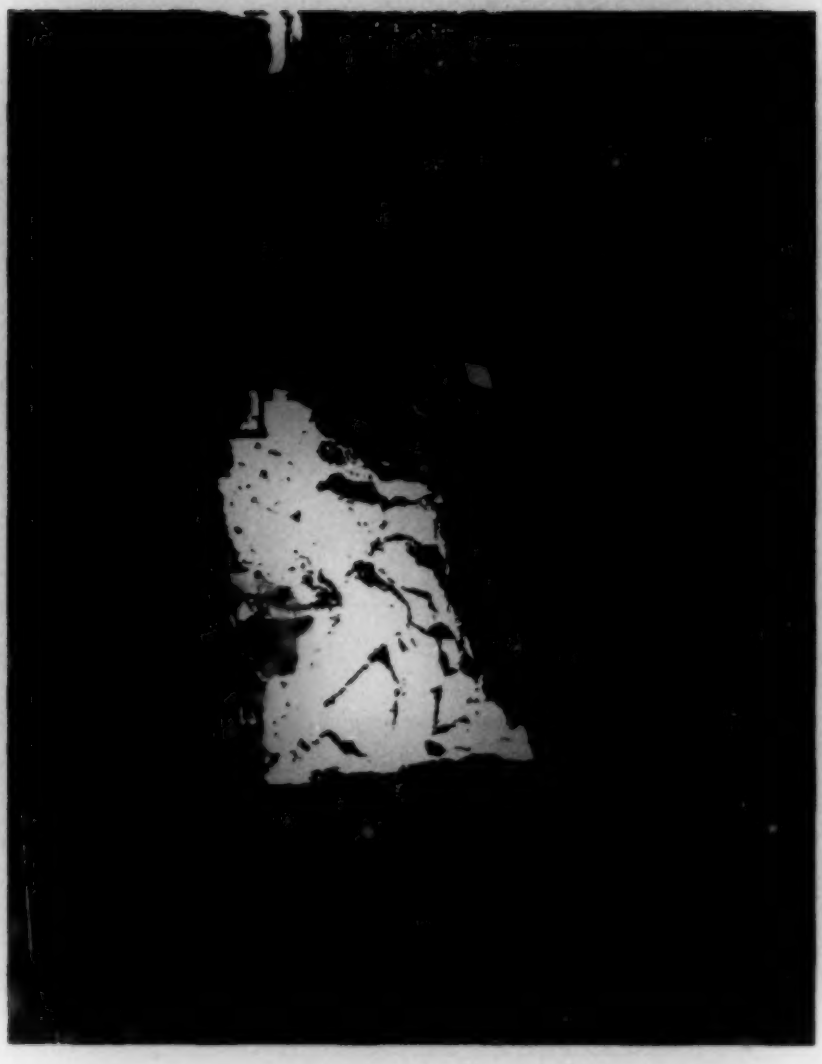

Exhibit K

Exhibit L

Exhibit M

EXHIBIT A
to Plaintiff's
REPLY IN FURTHER SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT

Minutes of March 1, 1971

The city council met in regular session at the City Hall of Pleasant Grove at 7:30 p.m. The meeting was called to order by Mayor Jack E. Cook who presided.

Prayer: Mayor Jack E. Cook

Roll call showed the following present constituting a quorum.

Mayor: Jack E. Cook

Councilmen: Walter Reimschiissel
Paul Blackhurst
Marvin Green
Cornell Haynie
Michael Vicchrilli

Recorder: Harold H. Bullock

Minutes of Council meeting held February 16, 1971 were read. Walter Reimschiissel made a motion seconded by Cornell Haynie that the minutes be accepted. Motion passed.

Mayor Cook read a letter from attorneys for Mr. Arnold Barney and Mr. Jack Cayias who are interested in obtaining an exclusive franchise for the purposes of operating a cable television system. It was felt that they should meet with the Council to explain the program in detail and that they be so notified.

Mayor Cook read a letter from Justice of the Pesce, Keith Anderson, concerning the development of an "Alcohol Countermeasures Program" in the State of Utah. He stated that Federal Funds are available for financing such a program without cost to City or County governments if a request is made by those units. Mr. Anderson urged that this request be made and that it would be a great help is dealing with confirmed alcoholics. He stated such a program would be such more effective in rehabilitating and giving medical help to this type of person.

Cornell Haynie made a motion seconded by Walter Reimschiissel that the City request that this program he adopted. Motion passed.

Mayor Cook read a letter from a local citizen calling attention to junk cars on the streets, improper and overnight parking on city streets and failure to remove garbage cans from the streets after garbage pick-up. All these things are in violation of city ordinances. The Council appreciated the concern of this public minded citizens and stated the ordinances will be enforced, and violators prosecuted.

Robert Penrod, District Commissioner, George Fannie, District Executive, and a group of scout and

scouts met with the council and presented a report of the scouting activities for the year 1971. The report was presented by Eagle Scout, Gary Weston.

Mayor Cook accepted the report on behalf of the Citizens of Pleasant Grove and congratulated the scouts and the scout workers for the fine job they are doing in building character and skills in the young men of our community.

Mayor Cook presented a check from Farmers Insurance to assist with the repairs to the J.C. Clubhouse in the amount of $495.00.

Mr. Ronald Chilton met with the Council concerning the laundromat building at 3rd South and Main which has been constructed one foot on city property. After discussion Cornell Haynie made a motion, seconded by Paul Blackhurst that a letter be sent Mr. Chilton notifying him that he move his laundromat building at 3rd South and Main Street, which is constructed one foot on city property, to comply with City Ordinances. Motion passed.

Rental of irrigation water owned by the City was discussed. Walter Reimschiisssel made a motion seconded by Paul Blackhurst that rental fee be set at $10.00 per share and that notice of irrigation water for rent be placed in the paper. Motion carried.

Mayor Cook stated that a letter be written the Fraternal Order of Eagles accepting the monolith of "The Ten Commandments" and stating it would be placed in a prominent place in the Rose Garden Park.

Noel Baum met with the Council extending an invitation to the Utah Valley Symphony ball March 18, 1971 at the BYU Wilkinson Center ballroom.

Mayor Cook read a letter from Senator Dean's secretary suggesting someone be designated to work with Mr. Rushton of the Forest Service in coordinating of planning efforts on the Uinta Forest. Mayor Cook stated he would follow on the matter.

Paul Blackhurst presented a survey of garbage rates charged various commercial establishments and apparent existing inequities. Each councilman was given a copy of the survey for study and to make recommendations for necessary changes.

Attention was called to the fact that multiple unit residences were being charged minimum water rates on the same basis as a single unit. The following ordinance was read:

***

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SUMMUM, Plaintiff, v. PLEASANT GROVE CITY, et al., Defendants.	)))))))))	Case No. 02:05-CV-0638 DB CERTIFICATE OF FILING OF PORTIONS OF DEPOSITIONS RE: PENDING MOTIONS [Filed U.S. District Court 2006 FEB 1]

PLAINTIFF, SUMMUM, by and through counsel hereby files and certifies that the document attached hereto is a true and correct copy of portions of the DEPOSITION OF JAMES DANKLEF and portions of the DEPOSITION OF FRANK MILLS that relate to the pending motions.

Dated this 1st day of February 2006.

UTAH LEGAL CLINIC
Attorney for Plaintiff

By /s/ James L. Harris, Jr.
BRIAN M. BARNARD
JAMES L. HARRIS, JR.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SUMMUM, a Corporate Sole and Church,	)	
Plaintiff,	)	
vs.	)	No. 02:05-CV-00638 DB
PLEASANT GROVE CITY, a municipal corporation; et al.	)	Deposition of: JAMES DANKLEF
Defendants.	)	

November 17, 2005
1:55 p.m. to 3:01 p.m.
Location: Utah Legal Clinic
214 East Fifth South Street
Salt Lake City, Utah

Reporter: Heidi Hunter, RPR
Notary Public in and for the State of Utah

APPEARANCES

FOR THE PLAINTIFF:
JAMES L. HARRIS, JR.
UTAH LEGAL CLINIC
Attorney at Law
214 East Fifth South Street
Salt Lake City, UT 84111

FOR THE DEFENDANT:
GEOFFREY R. SURTEES
AMERICAN CENTER FOR LAW & JUSTICE
Attorney at Law
6375 New Hope Road
New Hope, KY 40052

ALSO PRESENT:
(None)

INDEX

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EXHIBITS

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2	Photocopy of Ten Commandments Monument	44

[3] Thursday, November 17, 2005; 1:55 p.m.

PROCEEDINGS

(Exhibit 1 was marked.)

--oOo--

JAMES DANKLEF

called as a witness at the instance of the Plaintiff, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. HARRIS:

Q Go ahead and state your name and address for the record.

A James A. Danklef, a.k.a. Jim A. Danklef. I go by Jim because we have two James and we didn't want to be confused so I've gone by Jim. My address is 705 North 100 East, Pleasant Grove, Utah.

Q And is that your residence?

A It is.

Q What is your work address?

A 6th East 100 South, Pleasant Grove.

Q Is that your mayor job?

A It is.

Q And you are the mayor of Pleasant Grove; is that correct?

A Yes.

[4] Q How long have you been in that position?

A 3 years and 11 months this month.

Q Did you just have an election?

A We did.

Q Did you win?

A No.

Q Who's the new mayor or who will be the new mayor?

A Michael Daniels, Michael W. Daniels. He's presently on the council.

Q Now, is the position of mayor in Pleasant Grove a full-time position?

A No, it isn't.

Q What do you do when you're not playing mayor?

A I'm a school bus driver.

Q Have you had your deposition taken before?

A No.

Q Have you had a chance to talk with your attorney about what to expect here today?

A Well, a little bit. I mean, we just discussed what would --

MR. SURTEES: There's no need to go into that.

Q (BY MR. HARRIS) You don't have to tell me what you discuss. My purpose here today is to gather information. My purpose here today is not to trick you [5] or confuse you. If you don't understand a question that I'm asking, tell me that and I will try and clarify. I'm not the most articulate person but I will do my best. The court reporter as competent as she is can't take down both of us when we're talking at the same time so we need to take turns. In addition, she can't take down a nod of the head so you need to answer "yes" or "no" or whatever your answer is audibly.

A Okay.

Q I may ask you to speculate, or if you are speculating be sure and tell me that. I may ask you for your opinion. Again, be sure and tell me that it's your opinion. And I may ask a question more than once. Sometimes I forget what I've asked so that may be the

reason, but sometimes I may want to revisit an issue after we've gathered additional information.

A Sure.

Q Do you have any questions before we start?

A I don't think so.

Q What did you do to prepare for your deposition today?

A I just reviewed the letters that we've received.

Q What letters would those be specifically?

A The request for the monument to be put in our [6] park.

Q Okay.

A And then the follow-up letter that said that we didn't respond.

Q Did you review any other documents other than those letters?

A Not today, no.

Q You didn't look at any minutes or city records or anything like that?

A I did not.

Q Do you keep that information in a file in your office, the information that you reviewed?

A I do not. I do have both letters in a file but it's -- these letters are kept by our secretary. She keeps them in a file and as well as Tina has a file of everything like this. So I kept it for my records. Usually when I get a letter I turn -- like this, I turn it over to our legal staff to let them handle it.

Q What's your secretary's name?

A Amanda Fraughton.

Q Is she full-time position?

A She is, she's the city recorder.

Q Could you spell that last name, if you know?

A F-R-A-U-G-H-T-O-N.

Q Thank you. You say you do keep a file, do you [7] know the name -- what you would call that file or what the title of that file is?

A In my file I have letters from -- that need to be saved, letters from the county, letters from the state, and so forth, and so I just have a file there where yours is in the file that -- this letter is in the file that says "Need no response." The reason it says that is because Tina the attorney takes care of any response.

Q Is that where you would have kept your -- subsequently you did do a response. Is that where you would have kept that letter as well?

A I did -- I signed the letter. It was not -- I didn't draft the letter, it was drafted by our attorney and I didn't keep a copy of that.

Q So when this was produced and attached to your answer you believe that your attorney had that, you didn't have that in your office; is that correct?

A That's correct.

Q Do you remember signing that letter in November of 2002?

A I do.

Q Do you remember mailing that letter?

A Again, I sign it and it would be given to Amanda to make copies. Then she's the one that would [8] mail it.

Q Okay. Other than counsel, did you talk to anybody else in preparation for this deposition?

A No, I didn't.

Q What is your understanding of the litigation by Summum against Pleasant Grove?

A My understanding is that they -- the lawsuit is brought because we rejected their request to put that alongside of the Ten Commandments statue.

Q I'll show you your letter. This is simply a copy of the letter. In fact, it's marked Exhibit 1. This is a copy that was actually attached to your answer.

A Correct.

Q Does that look like the letter that you signed?

A It does.

Q In that letter you describe a practice. And you say that the park to which you refer does contain several structures, plaques, monuments, and permanent signs, all of which either directly relate to the history of Pleasant Grove or were donated by groups with log-standing ties to Pleasant Grove community. Do you see that there?

A Yes.

[9] Q Prior to this letter, do you recall that policy or that procedure ever being reduced to writing?

A Not prior to that, no.

Q Is this the first time you ever saw that policy reduced to writing?

A Yes.

Q Is that a policy and procedure that you were aware of prior to this letter?

A Prior to this letter we didn't have a written policy we just had a policy that we went by.

Q What was that?

A The policy was that it had to do with our pioneer heritage because it's in the Pioneer Park. So anything in there had to do with our heritage.

Q Your understanding is that anything that went in that park had to do with the heritage of pioneers or the heritage of Pleasant Grove or both?

A The pioneers in Pleasant Grove.

Q Let me talk -- we'll come back to the Ten Commandments monument. I want to talk about some of the items that are in the park. My understanding is the park is called Pioneer Park?

A That's correct.

Q If I see in the Pleasant Grove minutes where it's referred to Heritage Park, is that just something [10] that sometimes people call it, do you know?

A Yes. Yes, it's Pioneer Heritage Park is actually what it is.

Q And if someone was talking about the rose garden area of Pioneer Park, they're talking about.

A Southeast.

Q -- the portion. The south?

A Southeastern corner of the park.

Q Do you have any information regarding the Old Bell School that's on that park? What do you know about that?

A First school in Pleasant Grove. That's where they all went to school. Now we have stored in that a lot of artifacts and stuff of our pioneer heritage. They -- we continue to -- the Daughters of the Pioneers use that as a museum for many of the artifacts that's been collected. So that is one thing that is kept up all of the time. We've just gone through some renovation. It's an old soft rock building and -- sprinklers were left on, it started to crumble so we've, you know, renovated the outside to make it original. But that's what it's used for now is a museum, Daughters of the Utah Pioneers Museum.

Q Who owns that property or that building?

[11]A Daughters of the Utah Pioneers.

Q You think --

A DUP.

Q You think they own the building?

A To the best of my knowledge.

Q Tell me about -- is that on city property though?

A It is.

Q And then there are two log structures that are close to that.

A Correct.

Q My understanding is that one's a replica of a log cabin and the other one is a granary?

A Correct.

Q Do you have information regarding those structures?

A Daughters of the Utah Pioneers, again, invite school children, anyone that wants to tour that and look at our heritage of what's gone on in Pleasant Grove from 1847, because we were one of the first communities that Brigham Young sent people out to. So they take people on tours through there.

The granary was the first granary in Pleasant Grove where they stored all of their wheat and so forth. And they would go and gather -- when they wanted to [12] grind it to make flour they would go there and do that. I can't tell you what year in the -- maybe 80s, UDOT built a road, 1100 North, they widened that road. That granary was in the way so the Hatch family donated that to the city, and so that was put in the park.

Q Okay. My understanding is that there's another log cabin that the city recently located that is slated to go in that park as well?

A That's correct.

Q What do you know about that?

A There was a woman by the name of Sue Fox that had a parcel of property about -- somewhere between two and three acres. She sold that to be developed and it was attached to her home. And when they went to demolish her home they discovered that this log cabin was there. So the historical people got ahold of the city and we went up and -- I didn't personally, but our Leisure Services people went up and looked it over. And with the information that they had and the location of it, they determined that was probably the first log cabin built in Pleasant Grove. And we wanted -- the owner of the property, Joe Spencer, decided that he wanted Pleasant Grove City to have that and put it in that -- in the Pioneer Park. So we made a structure for it to put it on and that's what's happening.

[13] Q Now, was that -- that log cabin, was that proposed under the new 2004 written regulations that cities adopted?

A It was.

Q What is the procedure under that regulation?

A Well, it has to have some kind of historical value to the community, it has to be something that was part of our pioneer heritage, and that definitely was that. That was -- its -- it came off Battle Creek, and Battle Creek is our 200 South that goes up to Mount Timpanogos. That's where the battles were fought with the Indians when they first -- the Indians first came to settle there. In fact, close to there is one of the places Pleasant Grove got its name because of the grove of trees. And that's right in that same area where all of this took place. And with the history that our -- we have two people that take care of -- keep records of all of our history as best they can going back

-- Mildred Sutch is probably in her 80s and so is the other lady. Her name slips my mind, I'll remember it in a minute. They keep a record of everything that goes on and they have researched -- because people before them kept records of what's gone on and so they determined that was the first log cabin that was built in Pleasant Grove.

[14] Q What is the process that that cabin would have gone through as far as proposing it and reviewing it, and whatnot, under the new procedure?

A Our Leisure Services, we have a historical society in Pleasant Grove. It has about -- I couldn't tell you how many members it has for sure, but six or seven. And these people went up in this particular case and also in the case of the granary, they went and looked it over, determined the condition on how it was, you know, how it weathered and so forth, and then they determined that that would be an item that would be suitable to be put in Pioneer Park. And so that's where the recommendation came that that be put in the park.

Q So did someone approach the Historical Society first or does the Historical Society go out and locate items?

A Both. These two women that head the Historical Society are pretty good watchdogs. They watch for everything. In the first place, something has to be over 50 years old to be considered historical. We have a home on the -- we have several homes on Historical Society that have plaques and so forth, and anyway, the city recently purchased one of those homes -- well, not recently, several years ago and we just put plaques on two of them when we had our Heritage [15] Festival in September. So these women

keep records of all that and do tours and all of these sorts of things. They were the ones -- Joe Spencer, the guy that donated this log cabin, wanted to donate this. He went to the Historical Society and asked them if they would like that. They went and looked at it, they met and determined that was what they wanted to do.

Q Does the city tender to the Historical Society any official duties as far as determining what is appropriate to be added to a park or adding a plaque in the city or something of that nature?

A Well, basically Pioneer Park -- one of the first log cabins obviously would be something that would fit there.

Q My question goes to whether or not the city has tendered to the Historical Society any official duties as far as reviewing markers and reviewing items that then become owned by the city. Do you know if that's the case?

A I can't tell you for sure. I don't know.

Q So who would someone approach under the new regulation -- and we'll go back and talk later about what occurred before then. But under the new regulation, who would I approach if I wanted to donate [16] something to the city?

A The Pioneer Park is under the direction of Leisure Services, so you would contact our Leisure Services director which is Deon Giles.

Q If I wanted to just donate something in general that wasn't necessarily going to go into Pioneer Park who would I approach?

A Same person. He has the cemetery, the library, historical -- anything to do with the historical, rodeo grounds, those sorts of things, so he has

anything to do with recreation or Leisure Services, as we call it, Deon Giles would be the man.

Q And then does he approve or deny or does he submit it to a committee, what is the process?

A He does submit it to the committee.

Q What committee does he submit that to?

A Well, if it's an item such as the log cabin, he would go to the Historical Society or committee and they would discuss it. If you had -- for example, we have the sheep corrals, and in it we've got plows and various pieces of equipment the pioneers used to till their ground, I would still say the committee had to approve them being put in the park.

Q At what point does it then get referred to the city council or the mayor's office -- again, we're [17] talking under the new written procedure?

A Whatever they determine that would be a worthwhile item to be put in the park.

Q My understanding is that there's a stone of some sort in the Pioneer Park that is made of granite. And that was originally a stone from the Nauvoo temple site; is that correct?

A That's correct.

Q What information do you have on that display?

A I know who donated it to the city.

Q Okay.

A And he was -- John Huntsman is his name. He was a member of the city council, he was a stone mason and a police officer, but in his young days that's what he was, he was a stone mason. And my understanding was he went back to Nauvoo and did a lot of restoration work back there and he was given

that stone and he brought it back and wanted to have it displayed in our park.

Q Are you aware of any written process that occurred regarding the presentation of that stone and the acceptance by Pleasant Grove?

A I'm not aware of anything.

Q If I were to look for that kind of information, where would I look?

A I would imagine Mildred Sutch, the Historical [18] Society would have that information.

Q And so that would be the Historical Society. Is that a government agency? Is that adjunct to the mayor's office?

A It is not.

Q So they're a private organization?

A They are.

Q Would there be anything -- where would I look in the official Pleasant Grove records for that type of information?

A Probably -- it would probably be in the minutes. I'm making an assumption there that that's where it would be. If it was presented to the city it would have to have some type of a meeting and they would be minutes for that.

Q But you're not aware of any that exist related to this stone?

A I am not.

Q Are you aware of any criteria that would have been applied when -- any criteria that would have been applied when the city analyzed whether or not to accept that stone?

A No, I don't know.

Q To your knowledge, is that stone related to -- that stone in Pioneer Park, is that related to the [19] history of Pleasant Grove?

A It is.

Q Tell me how.

A Well, the pioneers -- the Mormon pioneers came across the plains, Nauvoo was one of the temples they built before they were driven west, and Pleasant Grove was settled by Mormons, so it's a part of our heritage.

Q My understanding is that there's a 9/11 monument in Pioneer Park; is that correct?

A That's correct.

Q Tell me what you know about that monument.

A That was an Eagle Scout project that an Eagle Scout took that on. It was approved for him to put that in there because of the -- we have police and fire people in our community. Also on the property there's Pleasant Grove's first fire station, and so it was felt appropriate at that time that that be there because of the heritage of firefighters and volunteers and police officers we do have.

Q You indicated it was approved, who approved that display?

A Leisure Services typically what they do is they'll go and ask Deon Giles if they can do an Eagle project in our community. That particular one went in the Pioneer Park. He also approves -- we do have an [20] Eagle project where the young man put flags clear around our cemetery, that also comes under Leisure Services. Almost everything that would -- an Eagle project would -- an Eagle would do as a project would be approved by Leisure Services because most of the

things would be in the parks and so forth so Deon is the one that would approve them.

Q Who would have made the decision to place that in the Pioneer Park?

A Deon did.

Q And is that monument related to the pioneer heritage of Pleasant Grove?

A It is because it ties in with that first fire station that we do have in the park there which was placed right near this monument -- or Eagle project.

Q Are you aware of any written criteria or any writings that dealt with the acceptance of that monument?

A I'm not aware of any but I'm sure there are -- there is something.

Q And would that information be similar to the information related to the granite stone in that I would ask Deon -- Deon Giles, is it?

A Yes.

Q Deon Giles or I would look to the city [21] minutes?

A Yes.

Q Have you ever seen any minutes that relate to that monument?

A I have not.

Q You've spoken briefly about the fire shed, tell me what information you have about the fire shed.

A That was in the location in our community and they were doing some remodeling or building a home on the piece of property where this sat, and it was determined that that would be an ideal item that would go in our park because it was the first -- it wasn't the first fire station, it's the door and it's just a small -- it's not even as big as this room. It was on the

front of the fire station. When the fire station was torn down they took this and put it on this person's property, then it was moved back. When they determined they'd build on the property, then they wanted to preserve that and it was brought down there then.

Q Do you know what the original date of construction of that might have been?

A 1850s sometime.

Q My understanding there's a wishing well or a well that's close to the log cabin, do you have any information regarding that wishing well?

[22] A I do not.

Q And you wouldn't have any information as to how that's related to the pioneer heritage of Pleasant Grove?

A I don't.

Q Are you aware of a gingko tree that's planted in Pioneer Park?

A I'm only aware of the name. I don't know anything about it.

Q You don't have any information regarding the plaque that's in front of that?

A I do not.

Q You don't have any information how that would be related to the pioneer heritage of Pleasant Grove?

A I do not.

Q Do you have any information regarding the rose garden?

A I do.

Q Tell me about that.

A It's a rose garden. It was -- we used to have a club, a garden club, that they planted a rose and in the

name of veterans that had lost their lives. That's my understanding of it. Now, that might not be the exact thing. There's probably 20 or 30 roses planted in there which we just recently remodeled the area where [23] it's at and -- for that, made it more appealing for people to look at.

Q Do you know when that was done? I was down there maybe two years ago, has it been since then?

A No, it was before that. You seen where the gazebo is at?

Q Correct?

A It's to the right of that and east. That area was all cleaned up. It got overgrown and so forth so it's just been -- you know, we have some people now that take pride and keep that up a little better.

Q Do you have any information regarding the old mill stone that's on the property?

A I do not.

Q How about the gazebo?

A The gazebo was purchased and put in there probably in -- between ninety -- well, probably '99 and 2001, somewhere in that area. It was just put in there as a place where people could go and sit and ponder and meditate and so forth, just a structure.

Q Are you aware of any writings or written criteria or anything that relates to the city's decision put that in the park?

A I'm not.

Q Again, I suppose if I were to look for that [24] information it would be either with Leisure Services or in the city minutes?

A I'm sure it would.

Q But you haven't seen anything related to that?

A I have not.

Q And that's fine. Tell me what information you have regarding the Ten Commandments monument that is in pioneer -- in the Pioneer Park.

A It was donated to Pleasant Grove City by the Eagles Lodge.

Q Do you know what Eagles Lodge donated that?

A The one there in Pleasant Grove. Originally that lodge started in American Fork and moved to Pleasant Grove, and they donated it to Pleasant Grove City, as well as they did many throughout the country, is my understanding.

Q Are you aware of any criteria that the city applied in accepting that monument?

A I do not.

Q Have you seen any city minutes that deal with that monument?

A I have not.

Q And how would that relate to the pioneer heritage or the heritage of Pleasant Grove? Are you aware of any way that that's related to what you've [25] described as the monuments in that park?

A Well that -- the Ten Commandments are part of Mormon heritage because that's why -- religious freedoms, that's why the pioneers came west.

Q Who owns that monument?

A Who owns it?

Q Yes.

A It was donated to Pleasant Grove. I think the Eagles still own it because they refurbished it several years ago. It was in there -- I'm not sure what year it was donated, but it was in disarray. It was -- you couldn't -- it wasn't really legible. They actually took

it and had it resurfaced and so forth to make it more appealing for people to look at, more noticeable.

Q Do you know when that occurred?

A I do not.

Q So what would -- would your position be -- and correct me if I'm putting words in your mouth or doing something that you don't agree with, whose speech then is on that monument? Would that be the Eagles' speech or would that be the city speech?

A I don't think it's either one.

Q Whose speech is on that one?

A Moses.

Q I'm going to show you a copy of that. And [26] this was taken -- that's the best copy I have.

A Right.

Q This was an attachment to the declaration of Frank Mills that was recently filed with the court.

A Correct.

Q So I assume this is something that your counsel produced for someone and the city produced and at the bottom it said, Presented to the city of Pleasant Grove and Utah County by Utah State Area Fraternal Order of Eagles. Are you aware whether or not that's -- that Utah County has any interest in that monument at all?

A I don't know.

Q And you're not aware of any process or written criteria that was applied when that monument was presented to the city?

A I do not. That was donated 35 years ago and I was a resident of the city, but to be honest with you, I didn't even know it was there for many years after -- before they -- after they'd given it to us.

Q Fair enough. So what is your understanding as to why that's a part of Pioneer Park?

A Well, I told you that I think that's part of the Mormon heritage. The Mormons were driven west. That's one of the ethics -- code of ethics that Mormons live by.

[27] Q You don't know anywhere where that's articulated in the city records?

A I do not.

Q Is that your opinion then?

A It is my opinion.

Q Are you aware of any other monuments or displays throughout the city that aren't located in Pioneer Park?

A Monuments? We have -- it's nothing to do with the city but we have several monuments on each corner of our -- we had an old fort there. There are monuments around town that -- stone monuments that -- and have a plaque on them that were placed there because of the corner stones of the old fort.

Q Your understanding is those aren't city plaques or they're not owned by the city?

A They're not.

Q Tell me about the bronze sculpture. My understanding is there's a bronze sculpture in the town center intersection of --

A There is.

Q -- a father teaching the children. Is that owned by Pleasant Grove?

A It is.

Q When was that erected?

[28] A 2002.

Q Are you aware of what -- and tell me what you know about that sculpture.

A Okay. We put Pleasant Grove Boulevard in and that -- it's a road that comes from the freeway right to the heart of Pleasant Grove Center Street. When Macey's built their big power center there, we put a clock tower there, fountain, and that statue -- or that statuary, and it was -- I was the mayor then, and we had a ground breaking, and we aimed it as the father pointing to his children to Mount Timpanogos.

Q Do you know who created that sculpture?

A I'm not -- I don't know. I know we had -- we had a sculpture -- a fellow come in and we had bids on it. And we had this particular guy -- I'm almost sure it was Lehi Foundry did the sculpture -- made it, but it was sculptured by someone else, and I don't know the gentleman's name.

Q What was the process that the city went through to try to adopt that as something that the city would own and display?

A Well, it's a -- it's an entrance to our city and we just wanted to put something nice there. We put the clock tower there. There's -- like I say, there's a fountain there, flagpole and so forth, and so it's -- it [29] was an additional piece that when we put that road through, it was a piece that was left over that was not used part of the roadway which we purchased part of the storage sheds to the south and that was a remnant piece that was left over, unusable because it was a pie shared little piece. We did not feel it was necessary to sell so we kind of wanted something really nice to be there as a entrance to our community.

Q Are you aware of any other displays throughout the city similar to that?

A Well, we've got -- no, not with the -- we do now in our memorial garden at the cemetery. We have a

big 8-foot tall statues of world -- or modern day soldier with a soldier in the era of George Washington, them with that colony-type hat on and -- we have that one there in the cemetery.

Q Is that a city-owned display as well?

A It was just barely dedicated last week, last Friday, and on Veterans Day it was -- all of that was purchased. The city donated the three quarters of an acre of the property to the Veterans Committee and they in turn built this -- it has a -- the statue, it has a flower garden around it, it has a rod iron fence and a fence clear around the three quarters of an acre piece with grass and trees and flags displaying the American [30] flag, Veterans of Foreign War flag, and a State of Utah flag. That was all done with private donations other than the property that Pleasant Grove donated to them.

Q Pleasant Grove owned that, you think, to the best of your knowledge?

A No. It's a -- we donated it to them and it will be maintained by the city but it's handled by the -- this organization, and they will have -- they'll do maintenance on it as far as maintaining the statues and that sort of thing.

Q Was that display undertaken under the 2004 regulation that the city adopted?

A You know, that was done through Leisure Services. The property was donated through -- we donated that through this system, but it was not -- everything that was in there was -- every decision made to what was to go into that was not made by the city council or the mayor.

Q Where would I find information regarding that?

A Deon Giles.

Q Are you aware of any discussions of that in city meetings that you attended or city council meetings or anything of that nature?

A All -- yes, because all of the statutes and all of that was -- the money was collected, given to the [31] city, the city bought the -- paid for everything that went in there through the donation process so we had to -- there was approvals to pay for cement, for trees, and this sort of stuff.

Q What would be the reason why that would not have gone through the newly adopted procedure that the city adopted for these particular types of displays?

A I can't tell you that.

Q Are you aware of anything that has gone through that new procedure that was adopted in 2004?

A Yeah, this last pioneer log cabin.

Q The log cabin did?

A Yes.

Q Are you aware of anything other than that log cabin that has gone through the newly adopted procedure?

A No.

Q Are you aware of any other displays that have gone up in the city subsequent to the adoption of that procedure?

A No.

Q I want to switch gears for a minute. We're going to talk a little bit about what occurred prior to the city adopting that 2004 regulation. How did you learn about this practice that you then articulated in the letter? What is your first knowledge of this [32] criteria?

A Well, we wanted to have -- we wanted items in our Pioneer Park that had something to do with our pioneer heritage or people that were of pioneer heritage that do things for our community.

Q My question goes to when were you personally first aware of this criteria?

A When we adopted the ordinance or the resolution.

Q You weren't aware of the criteria prior to that?

A I'm not sure I understand your question.

Q I'll try to be more clear.

A Okay.

Q I'm trying to understand when you first understood this practice that apparently was an unwritten practice that Pleasant Grove only adopted in the park items that directly related to the history of Pleasant Grove or were donated with groups with long-standing ties to Pleasant Grove, when were you first aware of that practice?

A Okay. I guess probably when I got -- came on the council in 1996 we built -- in our community we built what we call Block 4 which is apartments down there, whole block of apartments, Block 4 we call it. [33] This corral, the sheep corral that's in the Pioneer Park, had been used down there on that property by the Jacobs family to put their -- bring them in the winter and feed them in this corral and so forth. That was then taken down rock by rock and moved up to the Pioneer Park and it was rebuilt by Youth Court, by volunteers and so forth to preserve that -- the heritage of that which was on Center Street. And I was aware of it then because we moved it up there and put it in the park while I was on the council.

Q And you were aware that that was something that directly related to the history of Pleasant Grove?

A Yes.

Q Were you aware that that was donated by a group with long-standing ties to Pleasant Grove?

A Well, it was subsequently bought by a developer and all they were going to do is doze it down. The historical people determined that that would be an ideal place to put that and so we moved it up there and made a location there. Originally when we put it there -- that gazebo was out front there. It was moved to that location that you know where it's at now, and the winter stables, as we call it, was then put in that area.

Q Do you recall that practice ever actually [34] being articulated out loud?

A I remember talking about it but approvals and so forth, no.

Q What's your recollection of talking about?

A We talked about the purpose why we were going to preserve that because it was one of the pioneer families that runs sheep in that area and that was the winter stables where they put the sheep in and felt like it was part of Pleasant Grove's heritage just like a log cabin or anything else. The purpose of that park is for you to go there and look at what Pleasant Grove might have been way back when in the 1800s.

Q The second part of this practice that says, were donated by groups with long-standing ties to Pleasant Grove community, when is the first time you ever recall that being articulated?

A Then when we moved that stables.

Q And so what was the long-standing ties? It was donated by a group with long-standing ties to Pleasant Grove?

A It was donated by the Jacobs family who were one of the first families in Pleasant Grove and they wanted to keep that impact.

Q Your understanding is that that criteria could be applied alone without any historical relevance to [35] Pleasant Grove?

A Well -- I don't know.

Q So your letter that says, Our practice established over many decades has been to limit structures, displays, monuments, et cetera, to those which meet either or both of the foregoing criteria. To me that reads that you can accept something under either one of those. When's the first that -- when's the first knowledge that you have of anything being donated that you have information of under that second criteria?

A Under the second one?

Q Sure.

A Which -- read that to me.

Q Which says, Donated by groups with long-standing ties to the Pleasant Grove community. Could that be applied naked by itself?

A I guess it would depend on what you wanted to donate. If it was something to do with pioneer heritage, yes.

Q Are you aware of that policy ever being applied -- or I'm sorry, not applied. Let me back up. Are you aware of that policy or that practice being applied by itself to any gift or donation to items in Pioneer Park?

[36] A Probably the granary, and the winter stables, the fire station.

Q How about the Ten Commandments monument?

A The Ten Commandment monument.

Q How about the stone?

A I'm -- I'm not aware of any of the circumstances surrounding that. I only know -- I only know who donated it and I couldn't give you any more information other than that on that.

Q So who created this policy, do you know?

A It was drafted by staff, approved by city council.

Q This apparently prior to November 19, 2003, your letter, who established that policy prior to that time?

A It was just a policy set up by the Historical Society, by the -- those in Pleasant Grove who wanted to preserve anything historical. And the Pioneer Park was designated as a place to do that.

Q What does it mean to have long-standing ties to Pleasant Grove community?

A I would think that it would have to do with the family that's been there for generations and someone that has been -- served the community.

In this case, John Huntsman, who had donated [37] that stone, to the log cabin that was donated to the city because it was -- it had been the first log cabin in the community, the place was going to be demolished. So that would have ties to our community, long-standing ties, because it's been there since the 1850s. The fire station, the replica of the fire station -- not the replica, the original front door of the fire station, the granary, the winter stables.

Q Was there anything in writing prior to 2004 that would allow the city to determine whether or not a group or an individual had long-standing ties to Pleasant Grove?

A I don't know of any.

Q Do you know if there's anything in the new procedure that gives guidance as to whether or not a group has long-standing ties to Pleasant Grove community?

A That would be determined by those -- the Historical Society people, the Daughters of the Utah Pioneers.

Q Is there any written criteria that they can apply to determine that?

A I'm not aware of what they have. Can we take a break and feed the meter?

MR. HARRIS: Absolutely.

[38] (Recess.)

Q (BY MR. HARRIS) Summum made a request in writing in September -- I believe it was September 3, 2003. Are you aware of that request?

A I am.

Q The city did not respond to that request; is that correct?

A I think we did.

Q Do you recall someone making a subsequent request in September 17th of 2003?

A Prior to that letter I got?

Q I'm looking at your response that you have in front of you there, it's dated November 19, 2003?

A Correct.

Q Says, This is in response to your letter dated September 17, 2003?

A Right.

Q Are you aware of any response that the city have to the first letter of September 3, 2003?

A No.

Q So this letter that is dated November 19th is in response to the second letter of Summum, to the best of your recollection?

A Well, let's see.

Q I'm not trying to trick you here.

[39] A I know you're not. You know, I get the letter, I give it to our legal department, and then they determine what we have to do to it. So this letter, the original letter was given to Tina our city attorney. In return she took the -- took that information to our attorney for the Utah Trust, our insurance company, for their determination, and that's what generated our response on November.

Q November 17th -- I'm sorry, November 19th?

A Yeah, the November letter. And based on that, that's where we responded to that letter.

Q And would that have been the reason why it took two months for a response?

A Well, we have two city council meetings a month. November we only have one generally because of Thanksgiving, but anyway, we then have to have an executive session to discuss what we would do with this and then we had the discussion with the attorney through Tina -- through our attorney, and so that's the direction -- and that's why it took that amount of time to respond to that letter.

Q So who made the ultimate determination to reject Summum's claim or Summum's request?

A City council.

Q Is that information -- would minutes of that [40] be available in the city council meeting?

A Well, they're executive session minutes, they minutes, yes.

Q So the City of Pleasant Grove -- reading from your letter: The City of Pleasant Grove respectfully declines to grant the permission you request. Who evaluated specifically Summum's request?

A City council.

Q So it was the city council then that declined to grant the permission?

A That's correct.

Q Are you aware of any other rejections of a similar nature of a request to donate something or a monument -- a request to put up a monument or something that has been rejected by the city?

A I'm not aware of any request of any kind to put anything in the park other than this one.

MR. HARRIS: I think that's all I have.

MR. SURTEES: I just have a few just to clarify certain things.

EXAMINATION

BY SURTEES:

Q Let's just go back to this letter --

A Okay.

Q -- which I don't know if we've marked or not, [41] the letter dated November 19th. Do you agree with everything contained in that letter -- you signed it.

A Yes.

Q The Boy Scouts, according to your knowledge, have they performed any social services in Pleasant Grove?

A Yes.

Q The Fraternal Order of Eagles, did they give that monument to the city?

A It says they donated that to Pleasant Grove City. So I would assume if you were donating

something to someone you're giving up possession of it and giving it to that person then that accepts it. So I would say the city owns that.

MR. SURTEES: Thank you.

FURTHER EXAMINATION

BY MR. HARRIS:

Q What type of service does the Boy Scouts perform?

A Eagle projects, for example. They do many things. They put up basketball courts in our parks, they've -- they -- down at our rodeo grounds, they go down there, they clean that up, they paint, there are -- we have a Battle Creek Park, they did a pavilion in that park. In return they get to use the pavilion and so [42] forth for their Scout activities. We have a wilderness park, they maintain that. They -- they have a creek that runs through it, they have an annual fishing-hunting day in there. And so they do -- well, they do all kinds of things like that for our community.

Q Okay.

A They have many projects in our parks that they help clean that up, maintain our park -- our Discovery Park, they help with that. So -- they put flags out on holidays. So there are many projects that the Boy Scouts do for us.

Q Would the city reward a group like the Boy Scouts or other similar organization by more readily granting them access to a park such as Pioneer Park?

A We have a policy in Pleasant Grove that if they want to use a park -- scouts, church organizations, whoever, we have a fee that we charge them. To my knowledge in ten years that we've been on there we've had organizations come and ask to have that waived and we haven't done that.

Q My question goes to whether or not the city would reward a Boy Scout or a similar -- or the Boy Scouts or an organization for such service by granting them a permanent monument in Pioneer Park?

A Absolutely.

[43] Q Is that a policy prior to 2003 that was ever reduced to writing -- I'm sorry, 2004?

A I don't think we have any Boy Scout monuments in our park at all. So --

Q That policy in general, was that policy in general reduced to writing any time prior to 2000?

A I can't answer that, but to my knowledge, no.

Q And you've testified earlier that you thought that the Eagles might still own that monument and now you've indicated you think Pleasant Grove might own that monument.

A Well, it says on there "Donated to." After you asked me that question I got thinking if I donated something to you would it be yours or would it still be mine? The answer would be it would be yours.

Q Presented to the City of Pleasant Grove and Utah County, Utah, by Utah State Area; is that correct? Is that the wording that you read at the bottom of that monument?

A Yeah.

Q It might just be a matter of semantics versus donated. But the Eagles did exercise some measure of control. They took that monument and cleaned it up to the best of your recollection?

A They did.

[44] Q If the Eagles came to you and said we no longer want to maintain this display, remove it, would they have the right to do that?

A I don't think so.

Q So you think that the city controls whether or not that monument stays or remains in the park?

A They do.

MR. HARRIS: That's all the questions I have.

MR. SURTEES: Review.

(Exhibit 2 was marked.)

(The deposition concluded at 3:01 p.m.)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SUMMUM, a Corporate Sole and Church,	)	
Plaintiff,	)	No. 02:05-CV-00638 DB
vs.	)	
	)	Deposition of:
PLEASANT GROVE CITY, a municipal corporation; et al.,	)	FRANK MILLS
Defendants.	)	

November 17, 2005
9:24 a.m. to 10:41 a.m.
Location: Utah Legal Clinic
214 East Fifth South Street
Salt Lake City, Utah

Reporter: Heidi Hunter, RPR
Notary Public in and for the State of Utah

APPEARANCES

FOR THE PLAINTIFF:
JAMES L. HARRIS, JR.
UTAH LEGAL CLINIC
Attorney at Law
214 East Fifth South Street
Salt Lake City, UT 84111

FOR THE DEFENDANT:
GEOFFREY R. SURTEES
AMERICAN CENTER FOR LAW & JUSTICE
Attorney at Law
6375 New Hope Road
New Hope, KY 40052

ALSO PRESENT:
Tina Petersen

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[3] Thursday, November 17, 2005; 9:24 a.m.

PROCEEDINGS

--oOo--

FRANK MILLS

called as a witness at the instance of the Plaintiff, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. HARRIS:

Q Go ahead and state your name and address for the record, please.

A Frank Mills, 466 East 100 South, Pleasant Grove, Utah, 84062.

Q Is that your home or your business address?

A That's my home address.

Q What's your business address?

A 70 South 100 East, Pleasant Grove, Utah 84062.

Q Have you ever had your deposition taken before?

A Yes, I have.

Q I assume you've had an opportunity to consult with your counsel regarding the deposition today?

A Yes, I have.

Q The goal today is to gather information, my goal is not to confuse you, my goal is not to trick you. [4] If you don't understand a question that I ask, tell me that and I'll try and reword the question in such a way so that you can understand it. We both can't talk at the same time. We need to take turns. The court reporter, as competent as she is, can't take us both down at the same time. In addition, you need answer out loud. She can't take down the nod of a head. Do you have any questions?

A No.

Q What is your current position with Pleasant Grove?

A City administrator.

Q How long have you had that position?

A This will be the eighth year.

Q Eighth year?

A Eighth year.

Q What is your title?

A City administrator.

Q I saw in your affidavit where it says you've held the current position since 1998; is that correct?

A Uh-huh.

Q What were you before that time?

A Public works director just prior to that and administrative services director.

Q So you held both at the same time for a period [5] of time?

A Yes.

Q What are your duties?

A Basically to oversee the everyday operation of the city, the day-to-day functions that take place in the city in all departments. I have directors that report to me.

Q Is it a full-time position?

A Yes, it is.

Q And it's an appointed position?

A Yes, it is.

Q Who appoints you?

A The mayor with advice and consent of the council.

Q What did you do today to prepare for your deposition?

A I read through the -- read the information that was sent and that I had reviewed to make sure it was correct at the time.

Q What information?

A On the -- on my affidavit.

Q Did you talk with anyone else other than counsel in preparation for this deposition?

A Just to the two counsel here.

Q And the documents that you reviewed, were [6] those -- did you review any documents?

A Yes.

Q And have you described to me those documents? Those are the documents that -- your affidavit; is that correct?

A Yes.

Q Did you review any other documents in preparation for your deposition today?

A No.

Q Did you review any city minutes, any city records or anything of that nature?

A No.

Q Who -- again, other than counsel, and this is a general question, have you discussed this matter with?

A The matter of?

Q Of this lawsuit.

A Of this lawsuit? With the mayor and city council.

Q Anyone else?

A No.

Q When was the last conversation you had with the mayor regarding the subject matter of this lawsuit?

A I can't tell you specifically on this.

Q Okay. Approximately?

A Maybe two months ago.

[7] Q What was the nature of that conversation?

A Just in a discussion of how the -- if we were still in litigation on it.

Q When was the last conversation you've had with city council members regarding?

A It would have been at the same time.

Q Would it have been the same conversation?

A Yes.

Q Was that conversation in an official city meeting or was it a casual conversation?

A No, it was in a city meeting in executive session.

Q What's your understanding of the nature of this lawsuit?

A My understanding is that we had an organization that wanted to place a monument in one of our parks and it didn't meet the criteria.

Q What is the name of the park?

A Pleasant Grove Pioneer Park.

Q Now, I've seen in various city minutes and reports and whatnot where sometimes it's referred to as the Rose Garden or Heritage Park. What is the official name of the park?

A Pleasant Grove Pioneer Park.

Q Am I correct in stating that that park is [8] bisected by a road?

A Yes.

Q So the park is both on the north side of the road and the south side of the road?

A Yes.

Q But the entire park is referred to as Pioneer Park?

A Yes.

Q Thank you. What's the location of the park?

A It's located on First East in Pleasant Grove, and the road that dissects the park is First South.

Q Are you aware of the monuments, displays, and markers, et cetera, that are in the park?

A Yes, I am.

Q I want to talk about those. Tell me what you know about the Old Bell School.

A The Old Bell School is the oldest standing school in the state of Utah.

Q Was it originally built on this property?

A Yes.

Q Where does your information about the Old Bell School come from?

A. Histories that I have read, histories that I have been told, and from my 60 years of living in the community.

[9] Q What's the current use of that school?

A It is used as a museum to house artifacts.

Q Who owns the school?

A The school is owned by Pleasant Grove City.

Q So do you lease it to somebody?

A No. We allow the historic commission, which is part of Pleasant Grove, to put their artifacts in them.

Q What is that organization?

A Pleasant Grove Historical Commission.

Q If I recall correctly, I believe your deposition said that it was the Daughters of the Utah Pioneers. Do you know which organization it is that actually --

A The Daughters of the Utah Pioneers are -- that's their displays that -- it's in there, but it's under the direction of the Pleasant Grove Historical Commission.

Q So you allow the Pleasant Grove Historical Commission to use the building, and the organization that displays in the museum is the Daughters of the Utah Pioneers?

A Yes, it is.

Q What is the nature of the displays in that museum?

[10] A Historical items from the early days in the community of Pleasant Grove, and there are also some items from the early history of the state of Utah that pertain to individuals that settled in Pleasant Grove City.

Q Are there any items in there that don't relate to Pleasant Grove?

A Not that I can think of right offhand.

Q Now, there are two log cabins, is that correct, on the property as well?

A There is a log cabin and a granary.

Q Tell me what you know about the log cabin.

A The log cabin was constructed as a replica of a log cabin that would have been used in Pleasant Grove, donated to the city, and put on the location.

Q How long ago was that put on the location?

A I'd have to go back to look at the exact day, but I think it was 1947 or something like that.

Q Wasn't there another cabin that was just recently placed on the property in 2005?

A Yes, the granary. It's a log -- if you're referring to the log granary, it's the log granary that's there. It's not a log cabin.

Q When was that placed on the property?

A It was placed in there approximately -- maybe [11] five or six years ago.

Q Tell me what you know about the granary.

A The granary was one of the first granaries that was built in Pleasant Grove on a piece of property that was going to be excavated out and a road placed there. We were contacted and asked if the city would like to have that because it was one of the first granaries and typical of the granaries that were built at that time. They contacted our historical commission, the historical commission talked to our leisure services people that had the park at the time, they reviewed it and felt like, Yeah, we would like to preserve that, and we had it brought in and put in the park.

Q Where was it originally, one more time?

A Where was it originally?

Q Yes.

A It was located on 1100 North and 2nd West in Pleasant Grove.

Q Tell me what you know about the granite stone that's on the property. Isn't there a stone from Nauvoo called the granite stone?

A There's a temple stone from Nauvoo.

Q Do you know what that's made of?

A Yeah, it's made of a sandstone.

Q Tell me what you know about that.

[12] A Several years ago -- and I'm going to be hard-pressed to give you the exact date but, at least, I'm going to say probably 20 years ago a Mr. John Huntsman, long-time resident of Pleasant Grove, former police officer, assistant chief of police, well-known individual for being able to restore particularly the stucco on old buildings that were used at the -- in the early buildings in Pleasant Grove and other areas in the state of Utah, was asked to go back to Nauvoo, Illinois, by the LDS church and helped

them restore -- restoration project they were doing back there.

While he was back there, there was this stone that had been thrown away where they were excavating on the old temple. They were going to just dispose of it. And he'd seen it, asked them if he could have it, they said yes, he brought it back to Pleasant Grove and presented it to the city as a gift from him to the city of Pleasant Grove.

Q Where does your information come from on that?

A Talking to John Huntsman himself.

Q Is he still alive?

A No.

Q When did you talk with Mr. Huntsman?

A When he and I were serving on the city council and when I was a city employee.

[13] Q How long would that have been?

A Twenty years ago. I was on the city council 34 years ago and he was on the counsel with me.

Q Are you aware of any -- anything in the written record that reflects what you've told me about that stone?

A No.

Q Are you aware of anywhere in the written record that discusses what process the city went through to accept that stone?

A No.

Q Do you have -- if there were records of that nature, where would I look for those records?

A In the minutes of Pleasant Grove City council I think you'll find there was a -- probably a reference made to it from historical commission indicating that

Mr. Huntsman had brought it back and was gifting it to the city.

Q Are you aware of any criteria that was applied when that stone was accepted by the city?

A Not any written criteria, no.

Q Are you aware of any process that the city went through when they accepted that stone?

A Other than just contacting the historical commission to see if they felt like that would have any [14] historical significance to be placed in Pleasant Grove.

Q Do you personally know for a fact that the historical society was contacted on that issue?

A No.

Q Does the Historical Society keep records? Are you aware of whether or not the Historical Society keeps records?

A Yes.

Q Who would I contact with Pleasant Grove Historical Society for that information?

A Mildred Sutch.

Q S-U-C-H?

A S-U-T-C-H.

Q Do you know what her position is?

A Chairman of the Historical Society for Pleasant Grove.

Q Tell me what you know about the town hall.

A The town hall that sits on the pioneer property was the -- actually, the first city hall that was built -- town hall for Pleasant Grove City built out of soft rock that was quarried east of the community. It was built first as a town hall then later used as a school, an elementary school. Then it's been used as a -- the city library for many, many years. And now it's

-- city rents it out for a commercial business.

Q What kind of business is in there right now? [15] A It's called the Royal Victorian. It's a dress shop and then they have different knick-knacks that women particularly like to go in and buy.

Q Tell me what you know about the winter stable -- or the sheep -- also seen it referred to as the sheep pen or something along that line?

A Yes. Farming was a -- farming and animal raising was an important part of Pleasant Grove in its early times. And they had this community sheep corral that had been built and had set in disrepair for many years. The property that it set on was sold to a company that was going to build apartments and they were just going to destroy it. The Historical Commission along with volunteers from the community approached the developer and asked them if they could have it. They indicated that they could, so they went and took the stone down and stored it on city property at our shop until such time as they could make arrangements and get the help to locate it in the Pioneer Park.

Q Do you know when that was then built in Pioneer Park, approximately?

A Again, I'm going to have to -- I hate to guess but I'm going to say 10 to 12 years ago.

Q And that's fine. You know, if you make a [16] guess just be sure to tell me that you're making a guess. Tell me about the gazebo that's in -- I guess it's the rose garden section of the park?

A Yes.

Q What information do you have about the gazebo?

A We had a lot of requests from citizens to our Leisure Services Committee about the possibility of putting in a -- in a lot of city parks you see a bandstand, the bandstand in the park. There was a song written and sung by the King sisters who were born and raised in Pleasant Grove that had a part in it that went "The bandstand in the park deserted after dark." And so Pleasant Grove City purchased this gazebo and placed it in the park so that it would represent the bandstand that had been in the park at one time.

Q You say that the city purchased the gazebo. Do you know from what source the city purchased that gazebo?

A I don't know the name of the company they bought it from.

Q It was just a commercial company, you think?

A Yes.

Q And the bandstand in the park, does that refer to any specific bandstand in the park that you're aware of?

[17] A That would have been long before my time. Not that I'm aware of.

Q So you couldn't point to a bandstand that was in a Pleasant Grove park that that might have referred to?

A No.

Q Your answer is no?

A No.

Q Let me back up just a minute. What is your source of information regarding the winter stable or the sheep corral?

A As far as it being moved, I was involved with this.

Q You were involved with that?

A Yes.

Q So your source of information is that -- is personal?

A Yes.

Q Tell me about your source of information on the gazebo.

A I was working for the city when it was purchased.

Q Do you know of any records that relate to that gazebo?

A Again, I'd have to go back and -- we'd have to [18] go back and look in the city council meetings -- minutes. I don't know that there was any because it's an item that we would have just purchased through our regular budget procedure and put the structure in the park.

Q And you're not aware of any criteria that was applied when that was placed in the park?

A Other than to make sure that it met the structural standards that would be required.

Q Tell me what information you have on the fire shed.

A The fire --

Q Fire shed, correct?

A That building was located -- again, we had an individual that contacted us and told us they had the first fire department building that was in Pleasant Grove on their property. And for several years the Pleasant Grove volunteer fire department had tried to get it because -- I was on the fire department for years and with the group that tried to get it from the people, but the people were using it as a storage shed.

Well, they -- finally the key to -- the woman that was still alive that owned it died, and when she died she wanted the city to have it. And so at that point the fire department went through the process and [19] got permission from the city to refurbish it and then to place it in the park. And it's placed within probably 10 to 15 feet of where it originally stood.

Q So it was -- you think it was originally on that property and then it was moved to the private property?

A Yes, it was.

Q And are you aware of any criteria that was applied in accepting that gift, any written criteria that was applied in accepting that gift?

A Not of any written criteria.

Q And are you aware of any records that deal with that gift in the city records?

A There would be -- I'm sure there would be mention of it in the city council minutes. There would also be information through the local volunteer fire department.

Q Who would I contact with the local fire department for that information?

A Mark Hales.

Q What is his position?

A Fire chief.

Q Close to that is a 9/11 monument; is that correct?

A Yes.

[20] Q Tell me what you know about the -- that monument.

A That was a monument that was erected by an Eagle Scout for an Eagle Scout project in conjunction with the placement of the first fire station that we had

in town to remember the firemen particularly, and policemen, that were killed and lost their lives in the 9/11 attack.

Q And are you aware of any written criteria that was applied when that request was made?

A Only those -- only the requests that would have been made to the city council and the Leisure Services to have it placed in the park in the minutes. That's the only place I would know it would be.

Q Leisure Services, what is that?

A That's the -- one of the departments in the city that entails the parks, recreation, swimming pool, library, cemetery, heritage, the historic commission, beautification.

Q Who is in charge of that department?

A Deon Giles.

Q Do you know whether or not they keep records on some of the various historical displays and monuments we've discussed today?

A Yes.

[21] Q They do?

A Yes.

Q Would I contact Deon Giles to get that information?

A Deon Giles would be able to provide that along with -- he may have to have some assistance with Mrs. Sutch with the Historical Commission.

Q Do you maintain a file on the monuments and the displays that we've been discussing today?

A Pardon me?

Q Do you maintain a file?

A No.

Q Getting back to the various displays. Tell me what you know about the gingko tree.

A Gingko tree was planted there for Mr. Bill Hoglund. He was a recreation parks recreation director in Pleasant Grove for well over 20 years. He worked at it part-time while he had a full-time job at Geneva Steel. One of the local groups wanted to honor Bill. Bill was -- as he was retiring full time from the city and at that time they wanted to honor him so they did plant a tree in his name in the park thanking him for his service that he provided for the community.

Q Is he still alive, do you know?

A Yes.

[22] Q Are you aware of any written criteria that was applied when that request was made?

A No.

Q And that display, what does that display consist of?

A In the park?

Q What does it consist of?

A Consists of a tree with his name in front of it.

Q Is it a plaque in front of a tree?

A Yes.

Q What is your source of information regarding that?

A Personal.

Q You haven't reviewed any city records, et cetera, regarding that display?

A Deon, our Leisure Services director, would have it on record with his inventory on the trees that have been donated and planted in the city.

Q Have you seen those records?

A No, I haven't.

Q But you have reason to believe that Deon does have some information on those?

A Yes.

Q Tell me about the well that is in the park. [23] Is there a display of a well in the park?

A A well, wishing well, yes.

Q That's what it's called is the wishing well?

A No. People call it a wishing well. It was actually constructed just to the west of the log cabin that is there to show more a setting on what would be -- what would be in a homestead in Pleasant Grove at that time with a well outside. And they had -- I can't say for certain that it's still there but originally they built it around a hose faucet so that when they had to use water they could screw the hose in and run it through the well, and it looked like they was pulling water out of the well.

Q That wasn't something that was on another piece of property and then moved to Pioneer Park?

A No. It was constructed to enhance the park and show people more of what the homestead living would have been in Pleasant Grove at that time.

Q Who donated that?

A I'd have to look in my -- in my affidavit here, but I think it was the Lions Club.

Q Is that a local Lions Club?

A Yes.

Q Does Pleasant Grove have a Lions Club?

A Yes, they do.

[24]Q Do you know about how long ago that wishing well was constructed?

A I don't.

Q are you aware of any other displays that -- and we'll talk about the Ten Commandments monument. Are you aware of any other displays on Pioneer Park that we haven't talked about today? Maybe I can refresh your memory. We talked about

the pioneer museum, we talked about a log cabin replica, we talked about the granary, we talked about the stone, we talked about the town hall, we talked about the winter stable, the gazebo, the fire shed, the 9/11 monument, the tree, and the wishing well. Am I missing anything?

A Yeah.

Q Go ahead.

A Just the old mill stone from the original flour mill that was in town.

Q Tell me what you know about that display.

A It set on Mr. Joe Davis' property for many years, and as he -- sounds morbid, he knew he was going to die and he wanted to make a contribution to the city.

Joe had been lifelong resident. He lived in an area of town that was -- they call it the mill hill, it's where the old mill was. And the original stone and [25] gears that run that stone was still on his property and he approached the city to see if they wanted it. The city says -- went to the historic group first. They always go to them first. They went to them. They indicated they'd like it, they approached the city, and it was set next to -- again, in the same location as what the Old Bell School and the log cabin is.

Q About how long ago was that?

A I can't recall the exact date on that one.

Q And are you aware of any written criteria that was applied to the acceptance of that?

A No, it was the same as the other. There was a verbal communication.

Q As to any of these displays, are you aware of any process, specific process, that the city went through to accept these gifts?

A They were -- the process we went through is the one that we used at the time which was the historical commission would talk with -- would be approached to have something given to the city. They would in turn discuss it with our Leisure Services department and then it was discussed by the city council. If they felt like it met the cri -- the unwritten criteria that we had at the time of having it placed in the parks, and then -- if it was, then it was [26] placed.

Q What is that criteria?

A What is the criteria?

Q Yes.

A The criteria at that time, they looked if it had historical significance, if it was coming from one of the service clubs that had put a lot of service and time in with the city, if it was going to be something to commemorate or remember a local citizen that had provided service for the community, or if there was something that was going to enhance and not take away from the park itself.

Q Will I find that criteria in the minutes of the city?

A Not prior to the time that we adopted the resolution.

Q So how is this criteria passed from administration to administration?

A It wasn't necessarily passed from administration to administration as such because they changed so much. The process was handled through the city staff to begin with which -- why it was handled through the historic commission and then to our Leisure Services and then on up to the city council. And the staff was aware of the policies and criteria that we [27] were using.

Q Does anyone on the city staff -- has anyone on the city staff ever reduced that to writing?

A At our last -- at the resolution that we passed.

Q My question goes to prior to the resolution you passed in 2004, are you aware of that criteria ever being reduced to writing?

A Not that I'm aware of.

Q So where am I going to find evidence specifically of these criteria that was applied to these different displays?

A Several places. Mainly in talking to individuals; one would be in talking to members of the historical commission, the Leisure Services, and myself.

Q Would the city council go through that kind of a process when it was presented with these various gifts and displays?

A The city council always had the final say.

Q Did the city council ever in the minutes apply that criteria or indicate that criteria or state that this -- that criteria?

A I don't know.

Q You're unaware of that being in the city minutes?

[28] A I don't know.

Q Are there any other plaques, monuments, statues, displays throughout the city?

A Throughout the city?

Q Correct.

A There's markings at the four corners of the Old Fort in Pleasant Grove, but they're on individual people's property. And there are -- and like there may be a flag pole that somebody installed on a piece of

property that they put down this flag pole was erected by whoever put it up.

Q Did the city apply a criteria of aesthetics, in looking at these displays, that you're aware of; how the piece looks, what the piece looks like?

A Uh-huh.

Q And is that criteria -- could I find that criteria somewhere in the minutes? Is that an unwritten criteria?

A That was prior to the '04. That would be unwritten.

Q That was something -- that might have been something. Let me rephrase that. You believe that that was also something that they applied when presented with those gifts?

A Yes.

[29] Q What other criteria would have been applied?

A One of the things we always have to take into consideration is the safety factor. We're not going to let them place something that may be of a hazard to driving public, to the pedestrian, and also something -- it would need not to interfere with our regular maintenance and upkeep and use of that park facility.

Q Was location a criteria, an unwritten criteria that was applied, where the piece might be placed?

A Yes. Again, it would just be placed where it wasn't going to be a problem with what I mentioned in my last answer.

Q Was there a committee separate from the city council that analyzed requests for placement of gifts or markers or plaques or things of that nature?

A Now?

Q Prior --

A Or at any time? It depends. Yes, they would -- typically in the Pioneer Park, that comes through the Historical Commission first and then to the department that oversees the particular facility which is the Leisure Services.

Q Does the Department of Leisure Services, do they -- is it just the head that looks at that or do they have a committee that looks at those? Did they? [30] Again, I'm talking about prior to 2004.

A The leisure -- the Historical Commission would go to the Leisure Services. The Leisure Services director would discuss with them what they wanted to do, where they wanted to put it, what was going to be, and then would normally come and talk with the city council about it.

Q Are you aware of any displays that did not go through that process?

A That are in the park, I'm not.

Q How about any other displays of plaques, monuments, statues, et cetera, that are in Pleasant Grove?

A No, because if they were going -- typically if they didn't meet any of the criteria, it wouldn't have come to the city council.

Q We've been discussing a practice that you've described of accepting gifts by the city. When was that practice first articulated out loud, to your knowledge?

A The unwritten?

Q Yes.

A The first I'd been aware of it was when I came on the city council back in 1972.

Q Do you recall having specific conversations with anyone regarding that practice?

[31] A Yes.

Q Who?

A Mildred Sutch.

Q Mildred Sutch?

A Uh-huh. She's old.

Q And that would have been when you personally learned of this practice?

A Yes.

Q Did you discuss it with anyone other than Mildred Sutch?

A I discussed it with the -- part of my city council assignments was parks and recreation at the time, which is now the Leisure Services. I discussed it with the director of the Leisure Services -- well, parks and recreation at the time, Mr. Bill Hoglund.

Q Now, you've articulated two parts to that criteria; the first part is -- correct me if I'm misstating you. The first part is some kind of historical significance to Pleasant Grove; is that correct?

A Uh-huh.

Q And what is the second part?

A Well, it was more than a second part. There was Pleasant Grove, to the state, that was for service from individuals or organizations that were making the [32] donation, and if it was -- if it fit aesthetically to the park.

Q So the object could be related to the history of the state of Utah as well?

A Uh-huh.

Q So that was part of the unwritten criteria that you believe was applied to these types of gifts?

A Uh-huh.

Q Is that reduced to writing anywhere?

A No.

Q And then another part you indicate is some kind of a service organization?

A Yes.

Q When was that first articulated out loud?

A To me in 1972.

Q Related to? Describe that. Tell me how that came about.

A Let's take, for instance, the local Kiwanis Club in Pleasant Grove. We have a local Kiwanis Club in Pleasant Grove that does a lot of service projects for the community. They come in and they may want to ask if they can build -- let's say they wanted to build a restroom in one of the parks. They would come in, go through the procedure, not necessarily with the historical commission on that but to the Leisure [33] Services director. The Leisure Services director would in turn take it to the city council, the city council would say "yah" or "nay," and the Kiwanis Club, because of the service they rendered to the community, they have a park -- perfect example is the Kiwanis Park.

There's a piece of property that was owned by Utah Power and Light. Kiwanis Park had come to the city and said, Listen, we would like to erect a pavilion on that park and build a bridge to get over to it so the citizens of Pleasant Grove can use it. We made arrangements to lease the property from Utah Power and Light for a 99-year lease but we'd like to be able to use that and have the city use it as part of their park system for renting out pavilions.

The city took a look at it with the Kiwanis being a long time service organization of Pleasant Grove City, it fit into the park aesthetically, it met the requirements as far as structurally that it would do, and it helped provide something that would be useful

for the citizens of Pleasant Grove at little or no cost. So they said, Okay, let's do it.

Q Who owns that park?

A Pleasant Grove City has just now purchased the land from Utah Power and Light. We own it now. Prior to that it was owned by Utah Power and Light.

[34] Q Any other criteria other than what you've told me, the unwritten criteria that were applied to these types of requests and gifts?

A No, not that I can think of.

Q Tell me everything you know about the Ten Commandments monument.

A The Ten Commandments monument was placed in the Pleasant Grove park actually a year before I became involved with the city council in Pleasant Grove. It was placed in the park by the Eagles Club. If I remember correctly, the head of the Eagles -- I don't know what they call him nationally, they were having their convention in Provo, Utah, and one of the things he was doing at that time nationwide was placing Ten Commandments monuments in communities that had Eagles Clubs. Pleasant Grove had an Eagles Club and it was presented to the city in 1971.

Q Are you aware of any criteria that was applied when that gift was accepted by the city?

A The only criteria I can think of is the same as has been mentioned before with the unwritten criteria that we had.

Q Who owns that monument?

A Who owns the monument?

Q Yes.

[35] A As far as I know it belongs to the city now.

Q Have you seen anything in the city minutes or any writings that describe what process the city went through to accept that monument?

A I haven't personally read it, no.

Q You're not aware of any writing, any minutes, anything of that nature that would discuss the process the city went through to accept that monument?

A I've been -- it's been brought to my attention about the articles that were in the newspaper at the time that it was donated to the city or placed there, but I have not personally read minutes or read the newspaper article.

Q You did you not read the newspaper article?

A No.

Q When was the last time you went and looked at the monument?

A What's that?

Q When was the last time you saw the monument?

A What time did I go home from work last night? Yesterday.

Q Driving by?

A Yes.

Q Who was the speaker of the speech on that monument, in your opinion?

[36] A Who is the speaker of the Ten Commandments?

Q Sure.

A I guess God.

Q Would you say that that speech represents the donor's speech, the Eagles, or would you say that that speech represents the city's speech?

A I would say that it represents a set -- I've said this all along. It represents a set of laws, of rules that

all of us ought to try to live by. In fact, I think if we look at most of the laws that's been set up whether locally, state, nationally, internationally, they try to go by at least part of those writings that's on the tablets.

Q What part of the writings would that be?

A I think there's part that says, Thou shalt not steal, won't lie, won't cheat, things that way.

Q How about the writings that talk about Thou shalt have no other God before me, would that be the city speaking, would that be the donor speaking? Do you have an opinion on that?

MR. SURTEES: To the extent that that calls for a legal conclusion, I'm going to object to the form of the question.

Q You still are going to answer the question, and I'm asking you to speculate.

[37] A You want to repeat it?

Q Sure. You've indicated to me -- I'll try to reword my question. You've indicated to me you believe that some of the laws of the country -- or the core laws of the country are the basis of the Ten Commandments, and you've described to me certain commandments that you think apply. I'm also asking about those other commandments that deal with things of a different nature like, Thou shalt have no other God before me, Thou shalt keep the sabbath day holy, those different commandments.

Tell me, are the those the basis of law?

A Yes, they could be.

Q And on that monument, whose -- does that represent speech of the city, in your opinion?

A Yeah. I would say yes in the fact that it represents laws that we would hope that were -- that

all the citizens in, not only Pleasant Grove, but worldwide would try to live by.

Q The Ten Commandments related to Pleasant Grove or its history?

A Yes. It's related to everybody's history.

Q Tell me specifically how it's related to Pleasant Grove and Pleasant Grove's history?

A I think if we take a look at Pleasant Grove, Pleasant Grove is no different than any other community [38] in the state of Utah or the United States or the world anywhere else. There are certain laws -- some want to call them values, I refer to them as laws, that we would hope our citizens would try to go by to be good citizens. And those Ten Commandments obviously make a good basis for that, not being all of it but probably make a good basis for it.

Q I'm not sure that answers my question, how the Ten Commandments specifically relate to Pleasant Grove. Are you aware of any way that the Ten Commandments are specifically related to Pleasant Grove or Pleasant Grove's history?

A Are you talking about the Ten Commandments or the plaque?

Q The Ten Commandments monument --

A Okay. The monument -- you asked the Ten Commandments. The Ten Commandments plot -- plaque as it sets there doesn't relate to the history, it relates to a service organization that provides the unmeasurable service to Pleasant Grove City.

Q Was that true at the time that the --

A Yes.

Q -- the donation was made?

A Yes.

[39] Q Are the Ten Commandments related to the pioneers? Are the Ten Commandments monument in the Pioneer Park related to the pioneers?

A Not that I know of.

Q Are the Ten Commandments -- is the Ten Commandments monument in Pioneer Park related to the founding of Utah?

A Not that I know of.

Q Is the Ten Commandments monument related to the founding of -- in Pioneer Park related to Pleasant Grove or the founding of Pleasant Grove?

A Not that I'm aware of.

Q Are you aware of how the city came -- the city formulated its policy in 2004, its written policy now that deals with the donation of monuments, plaques, historical markers, et cetera?

A Yes.

Q Describe that process to me.

A Because of litigation that had taken place and reviewing things that we should do to try and -- in all -- and in as many cases as we can, we find new ones all the time in different areas of the community, put in writing what we expect; whether it be for an individual's job performance, whether it be for the use of a building, whether it be for placements of plaques [40] or anything else in the parks.

Our legal counsel along with the city council and staff formulated the resolution with the criteria that we felt like would cover the full gamete of what we wanted to accomplish.

Q Have you had any requests under the new policies yet?

A Have we had requests, yes.

Q What are those?

A We had one request just recently to have the first log cabin that was constructed in Pleasant Grove City moved to the park.

Q Has that been moved yet?

A It's been moved to the -- it's been moved off the property into a parking lot waiting for the foundation and that to be built to put it on.

Q What process did the city go through in accepting that donation?

A Went through the process that we now have outlined.

Q Are there minutes of the request and the process that was recently made?

A To my knowledge, yes.

Q Is there a committee that's set up now that deals with those requests?

[41] A Yes.

Q Who is on that committee?

A Historical Commission.

Q And that consists of who?

A Consists of Mildred Sutch as chairman, Beth Olsen as the professional consultant, Mr. Dale Warburton as a committee member, Bill Told as a committee member. I think there's one more but I -- I haven't got it right off the top of my head.

Q Any of them city employees? Any of those people city employees?

A No.

Q So has the city tendered to them the decision-making ability regarding those types of displays?

A No, they make the request to our Leisure Service director, which is Mr. Deon Giles, who in turn

brings it to the city council, who in turn makes the final decision.

Q Do they screen those requests, the historical commission or committee?

A I would -- I can't say for certain but I would anticipate, at least, in talking to Mr. Giles that if it doesn't fit into this criteria they don't typically look at them.

[42] Q So if I want to make a donation to Pleasant Grove of some kind of historical marker or monument, I have to go through that committee first?

A Yes.

Q And they have -- the city has tendered to them the right to not forward that request on?

A If it doesn't -- if it doesn't fall into the criteria here, typically they would -- it would not. It would be the right for the applicant to appeal it and go directly to the city council. But if it doesn't meet the criteria for one reason or the other, typically --

Q Have there been any other requests other than that log cabin since the formulation of that written policy that have been made of the city?

A There has been a request made to the historical commission and to Leisure Services. They haven't brought it to the city council -- the one that I'm aware of so far, and that's for -- there's the first ice house that was built in Pleasant Grove. And I think the only reason that maybe hasn't been brought to the city council yet, that I can think of, is the individual whose property on, they aren't ready to have it moved just yet. But that I'm aware that will be coming to the city council.

Q Those would be the only two requests you're [43] aware of, the log cabin just recently and the ice house?

A Yes.

MR. HARRIS: Take a break.

(Recess.)

Q (BY MR. HARRIS) Looking at your declaration.

A Yes, sir.

Q And I assume you have a copy but I'll provide a copy.

A Okay.

Q I only have one.

A I've got mine here.

(Exhibit 1 was marked.)

Q I'm looking at Number 7 on Page 3?

A Okay.

Q Therein you say it was been the practice of the City of Pleasant Grove for decades to accept only artifacts, historical buildings, monuments, plaques, et cetera, which have some historical significance to our community or were donated by individuals or organizations with well-established Pleasant Grove connections. Do you see that?

A Uh-huh.

Q Is that your position?

A Yes.

Q What does it mean to have well-established [44] Pleasant Grove connections? How would you define that?

A When they talk about that I'm talking about both individually -- and, again, like in the case of Mr. Hoglund when the tree was donated to him, also Mr. Huntsman when he came back with the stone that he

wanted to gift to the city, the Kiwanis Club, the Lions, the Eagles, those type of people that have those ties to Pleasant Grove. Another one that I would hope sometime would happen is next to the Pioneer Park is the old King sisters home. It's a private residence right now but it sure would be nice if they'd donate that to the city but -- because of the connection and roots that the King sister have to Pleasant Grove City, but just have to wait and see if something like that happens.

Q You described to me individuals and organizations that you believe meet that criteria. What I'm asking about is what is that criteria specifically?

A That they -- the type of service that they've provided to the community or are providing to the community. If they have as an individual displayed the type of traits that we would hope that the community of Pleasant Grove stands for. As I look at Bill Hoglund, if everybody had somebody that was willing to put the time and effort into a job that he did and try to build [45] up the programs that we have in Pleasant Grove the way that he has and did, there should be some way to recognize those people or organizations.

Q Prior to 2004 was that well-established criteria written anywhere? Was there any way for somebody to look in the written record somewhere and see what types of criteria would determine whether or not an individual and organization was well established?

A Not that I'm aware of.

Q Is that defined in the current regulation?

A I think so, looked in the resolution there, I think, it gives the criteria for the placement.

Q Does it define what would be -- to your recollection -- and we can look at that in a minute. To your recollection, does it define how the committee is to determine whether or not an organization or individual has well-established connections to Pleasant Grove?

A It lists criteria, whether it defines it under the well -- under the established -- well-established connections, I don't know if it describes it that way. It does give specific criteria requirements.

Q Looking at Number 8 on Page 4 of your declaration, it says: Every item in Pioneer Park has some connection to the settlement, history, or cultural [46] life of Pleasant Grove past or present or it was donated by individuals with long-standing ties to this community. Do you see that?

A In eight?

Q In eight, yes. Is that your position?

A Uh-huh.

Q Same question: Prior to 2004, is there anywhere that defines for anyone examining some kind of a gift to the city whether or not a group or individual has long-standing ties to the community?

A Not that I'm aware of.

Q Do you know if that criteria, to the best of your recollection, is in the current regulation?

A Yes, I think that it's covered in the criteria, yes.

Q And is there something that then defines what is a long-standing tie to the community?

A I don't know if it defines the long-standing tie, it just lists the criteria that would be inspected.

Q Your answer is prior to 2004, there's nothing in writing that would have allowed someone examining a gift or a proposed gift to the city whether or not somebody was well established -- had well-established Pleasant Grove connections or had long-standing ties to the community?

[47] A I'm not aware of anything written.

Q Skipping down to Number 13, this deals -- in this paragraph you indicate the city received a request by the plaintiff in this action, Summum, to install a monument?

A Okay.

Q You say the request was evaluated in accordance with the decades old criteria. Who did that evaluation?

A City council.

Q City council did?

A Uh-huh.

Q Are there minutes that describe that evaluation?

A I don't know.

Q Have you reviewed any minutes that describe that evaluation?

A I have not.

Q But you believe it was the city council that did that evaluation?

A Yes.

Q Did the Historical Society look at that?

A I don't know. I don't know if they were --- I don't know if they were contacted first.

Q Were you a part of that evaluation?

[48] A No.

Q Was the mayor part of that evaluation, to your knowledge?

A Was what?

Q Was the mayor part of that evaluation, to your knowledge?

A The elected officials all would have been involved with that.

Q How does the September 11th monument relate to Pleasant Grove?

A Pleasant Grove has a volunteer fire department. Our volunteer fire department, of course, as all the fire departments throughout the nation were affected even though they may not be working with those firemen. The fire service is, as I was a member of it for 30 years, still am, looks at it as a brotherhood. So when they were approached and asked to do that, the city felt like that was a fitting memorial to put in to remember those firemen that then -- police officers that lost their lives on September 11th and also to help to recognize firemen that we have lost in the line of duty in Pleasant Grove.

Q Does that monument have any historical significance to Pleasant Grove?

[49] A Yes, because of our local fire department.

Q It would seem to me that that would be under the well-established ties as opposed to historical significance, would that be incorrect in stating?

A That would be one of them, but I still -- the historical part of it would be that Pleasant Grove still operates with the volunteer fire department the same as it did when it was first created.

Q Do you know anything about Rick Best?

A Who?

Q Rick Best, looking at Number E on Page 2.

A He would have been the Eagle Scout that put

it up. I don't know -- I don't know Rick Best personally.

Q What's your source of the information that you set forth in Number E there?

A E?

Q Yes.

A Being over there when they put the monument up, watching it being constructed, talking to those that were building it, visiting with them.

Q Rick Best a Pleasant Grove resident?

A As far as I know, yes. I think his father -- I'm guessing. I know --

MS. PETERSEN: He is, I know him.

MR. HARRIS: But you don't get to testify.

MS. PETERSEN: Just for your information he [50] does live in Pleasant Grove.

Q (BY MR. HARRIS) Who drafted this declaration for you?

A The legal counsel drafted it, sent it to me, asked me to review it, make changes that -- that I didn't think was correct. I reviewed it to the best -- the same way I do all the legal documents that come by, I take them seriously, I reviewed it, signed it, added information.

Q Let me look through my notes. We may be just about done with you.

MR. HARRIS: I don't have any other questions.

MR. SURTEES: I just have a few follow-up questions.

EXAMINATION

BY MR. SURTEES:

Q Earlier in the deposition, Mr. Mills, you were asked about a newspaper article regarding the

donation of the Ten Commandments. In the document that was provided to you, your declaration, Page 4, Paragraph Number 10 you reference a newspaper article there.

A Uh-huh.

Q Do you remember seeing that newspaper article?

A The newspaper article we're talking about there, yes.

[51] Q And?

A I thought it was referring to a newspaper article it might have been in our exhibits that I'd been given.

Q Let's clarify here. This Paragraph 10 refers to a newspaper article which was -- which was attached to your declaration. So that is a newspaper article you have seen?

A Well, I didn't have the newspaper article attached. I have seen this newspaper article you're referring to here.

Q Okay. And he is pointing to a newspaper article that's entitled Monument Erected in Rose Garden by Eagles Organization, and it is not actually labeled Exhibit N, but I would submit is the Exhibit N referred to in the declaration that we're discussing.

One other question, just to clarify the record here, paragraph 15 of this letter -- I'm sorry, the declaration, refers to the May 6, 2005, request. Did you ever see a copy of the May 6th letter?

A No, I did not see a copy of that letter.

Q And do you know whether or not the city granted any request by the Summum to put its monument in the park, whether that request was

made in May or whether it was made at some other time?

[52] A As far as I know it was made prior to that date.

Q Do you know -- do you know now that the plaintiffs in this case are saying that they submitted a letter in May, again, asking the city to erect its monument?

A I've been told that that's what they'd done.

Q You know that that request was not acted upon -- well, let me rephrase that. You know that that request was not granted by the city, correct?

A Yes, as far as I know.

Q And, to your knowledge, the reason why it would not have been granted is because of the criteria that we've been discussing back and forth during this deposition?

A I would assume.

MR. HARRIS: I'll object. These are leading questions, but go ahead.

MR. SURTEES: Sure. That's it.

MR. HARRIS: You're done.

MR. SURTEES: I am done.

FURTHER EXAMINATION

BY MR. HARRIS:

Q The newspaper article, you say you saw the article. Did you read the article?

[53] A I read the article.

Q Now, you quote the mayor in that article in your declaration; is that correct?

A Yeah, Mr. Mayor Cook.

Q Do you recall in reading that article were there other statements made by people at that presentation?

A I'm trying to think. No, not that would have stuck with me.

Q Would there be a reason why you would quote the mayor and no one else from that article?

A Simply because the mayor is giving the reason of why he thought -- I think if you read that there, tells why he thought that was good for -- you know, coming to Pleasant Grove.

Q Do you have a copy of that newspaper article?

A I don't. That's why I say I didn't read it because I didn't have it here.

Q Let me take a quick break, I'll provide you with a copy and we can look at that.

(Recess.)

MR. SURTEES: I have a copy. Back on the record.

Q (BY MR. HARRIS) You have a copy of the newspaper article that we've been discussing?

[54] A Yes.

Q And it says: Monument Erected in Rose Garden by Eagles Organization?

A Yes.

Q In your declaration you quote -- you quote Mayor Cook?

A Uh-huh.

Q Stating his reasons -- well, you quote Mayor Cook.

A Uh-huh.

Q Now, do you see down there where it says Commissioner Roberts?

A In here?

Q Yes.

A Yes.

Q Can you read that paragraph real quick?

A Commissioner Roberts urged all citizens to pause and meditate upon the meaning of the great standard inscribed on the monument.

Q Do you think that that as well might be a reason that the monument was erected?

A No, because Commissioner Roberts isn't a city official with Pleasant Grove City and the mayor was.

Q Do you know who the monument was donated to?

A Do I know who it was donated to?

[55] Q Correct.

A My understanding is it was donated to Pleasant Grove City.

Q Can you see the picture there -- and I admit it's a bad picture.

MR. SURTEES: That's my fault.

Q And I'm reading there, it says presented to the city of Pleasant Grove and Utah County, Utah. Is there any reason that you believe this was not donated to Utah County as well?

A Yes, I think it was just donated to Pleasant Grove, Pleasant Grove being in Utah County. I realize what it says there, but you asked what I thought.

Q You would dismiss Commissioner Roberts' declaration as to what he would like to take place regarding the inscription on that monument?

A No, I wouldn't dismiss it.

Q Do you think that's one of the reason why it was erected?

A I don't know.

MR. HARRIS: That's all the questions I have.

(Deposition concluded at 10:41 a.m.)

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The following transaction was entered on 5/2/2007 at 2:07 PM MDT and filed on 5/2/2007

Case Name: Summum v. Pleasant Grove City et al
Case Number: 2:05-cv-638
Filer:
Document Number: 257 (No document attached)

Docket Text:
DOCKET TEXT ORDER granting [245] Motion to Stay; granting [247] Motion for Extension of Time to File Response/Reply; denying without prejudice to renew [252] Motion for Preliminary Injunction. The stay will be lifted upon receiving the Mandate from the Tenth Circuit Court of Appeals. Signed by Judge Dale A. Kimball on 5/2/07. No attached document. (awm)

PETITIONER'S BRIEF

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FILED
JUN 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-665

IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, *ET AL.*,
Petitioners,

v.

SUMMUM, a corporate sole and church,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

Petitioner Pleasant Grove City owns and displays a number of monuments, memorials, and other objects in a municipal park. Respondent Summum sued in federal court, contending that because the city had accepted monuments donated by local civic groups, the First Amendment compels the city to accept and display Summum's "Seven Aphorisms" monument as well. The district court denied Summum's request for a preliminary injunction, but a panel of the Tenth Circuit reversed, holding that the city must immediately erect and display Summum's monument. The Tenth Circuit then denied the city's petition for rehearing en banc by an equally divided, 6-6 vote. The questions presented are:

1. Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor?
2. Did the Tenth Circuit err by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties?
3. Did the Tenth Circuit err by ruling that the city must immediately erect and display Summum's "Seven Aphorisms" monument in the city's park?

PARTIES

In addition to petitioner Pleasant Grove City, the following parties were defendants-appellees in the Tenth Circuit and are petitioners here:

Jim Danklef, Mayor[1]
Mark Atwood, Cindy Boyd, Mike Daniels, Darold McDade, and Jeff Wilson, City Council Members
Carol Harmer and G. Keith Corry, former City Council Members
Frank Mills, City Administrator

Respondent Summum was the plaintiff-appellant in the Tenth Circuit.

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[1]Pursuant to S. Ct. R. 35.3, petitioners advise this Court that respondent Mike Daniels has succeeded Jim Danklef as Mayor of Pleasant Grove City. *See* Defendants' Notice of Automatic Substitution of Mayor of Pleasant Grove City in His Official Capacity (D. Utah Dec. 4, 2006) (Doc. 173).

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INTRODUCTION

The court below ruled that, once a city accepts and permanently displays a monument donated to it by a private party, the city creates a forum for permanent monuments and must then accept virtually any other monuments donated by private parties for permanent display. The First Amendment, however, requires no such thing. As the D.C. Circuit put it, "If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee." *PETA* v. *Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005).

As discussed herein, the Tenth Circuit made several crucial errors in constitutional analysis. First, the court below fundamentally misapprehended the distinction between **government speech** and **private speech** in this case. Second, the court below misidentified the relevant "forum." Third, the court erroneously held that city parks are traditional public fora for private, unattended, permanent monuments. Fourth, the lower court erred by holding that a city's acceptance of donated monuments creates a designated public forum for private speech through such monuments.

Only through this succession of missteps could the Tenth Circuit reach the decision it did. This Court should reverse.

Disposition of the present case is straightforward: there is no forum for private speech in the government's choice of what monuments permanently to display, and the government is free to adopt the theme or message it desires in selecting such monuments. The government's acceptance and display

of one or more donated monuments does not require that a government park be turned into a cluttered junkyard of monuments contributed by all comers.

In short, accepting a Statue of Liberty does not compel a government to accept a Statue of Tyranny.

This Court should reverse the decision of the Tenth Circuit.

DECISIONS BELOW

All decisions in this case to date are captioned *Summum v. Pleasant Grove City*. The panel opinion of the Tenth Circuit appears at 483 F.3d 1044 (10th Cir. 2007). Pet. App. A. The opinions accompanying the denial of rehearing and rehearing en banc appear at 499 F.3d 1170 (10th Cir. 2007). Pet. App. F. The decision of the district court denying (*inter alia*) Summum's motion for a preliminary injunction is unreported. Pet. App. B.

JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit issued its panel decision on April 17, 2007, and denied a timely petition for rehearing en banc on August 24, 2007. This Court granted a timely petition for certiorari on March 31, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

The text of the First and Fourteenth Amendments to the U.S. Constitution are set forth in Pet. App. G.

The written city policy governing the acceptance and placement of monuments is set forth in Pet. App. H.

STATEMENT OF THE CASE

1. Jurisdiction in District Court

The complaint in this case invoked 42 U.S.C. § 1983, and the district court had jurisdiction under 28 U.S.C. § 1343. The complaint also raised pendent state claims, invoking jurisdiction under 28 U.S.C. § 1367. The pendent state claims are not before this Court in the current posture of the case.

2. Facts Material to Consideration of the Questions

a. Pioneer Park

Petitioner Pleasant Grove City is a municipality in Utah County, Utah. It was settled by early Mormon pioneers, Danklef Dep. at 11 (JA 134), and was once the site of a fort, *id.* at 27 (JA 146); Mills Dep. at 28 (JA 180). One of the city parks in Pleasant Grove is Pioneer Park. That park contains a variety of buildings, monuments, plaques, and memorials that either portray the Mormon pioneer-era heritage of Pleasant Grove, or are contributions of local civic groups, or both. *See* Danklef Dep. at 9 (JA 132-33); *see also id.* at 36 (JA 153) (Pioneer Park was designated as the place "to preserve anything historical").

Describing how various objects come to be placed in Pioneer Park, the then-mayor and the city administrator explained that the local Historical Commission would initially review objects for possible

placement in Pioneer Park. Danklef Dep. at 14-15 (JA 136-37); Mills Dep. at 13-14 (JA 169-70). In some cases, the Historical Commission would itself initiate the review; in others, someone would suggest the display to the Historical Commission. Danklef Dep. at 14 (JA 136); Mills Dep. at 13-15 (JA 169-70). If the Historical Commission considered the proposed memorial or monument suitable, it would refer the matter to Leisure Services, the city authority responsible for managing Pioneer Park. Danklef Dep. at 16 (JA 137-38); Mills Dep. at 11, 20, 25-26, 29-30, 41-42 (JA 168, 175, 178-79, 182, 190-91). If the Historical Commission and Leisure Services agreed the object was suitable and worthy of permanent display, the matter would go to the city council for the ultimate decision whether or not to accept the object and place it in Pioneer Park. Danklef Dep. at 16-17, 39-40 (JA 138, 155-56); Mills Dep. at 20, 25-26, 41 (JA 175, 178-79, 190-91). "The city council always had the final say." Mills Dep. at 27 (JA 180).

The various objects in Pioneer Park include:

- Old Bell School (oldest known school building in Utah)
- First City Hall (original Pleasant Grove Town Hall)
- Pioneer Winter Corral (historic winter sheepfold)
- First Fire Station (facade of city's first fire station with plaque, bequeathed to city)
- Nauvoo Temple Stone (artifact from Mormon Temple in Nauvoo, Illinois, donated by John Huntsman)
- Pioneer Log Cabin (replica, built in 1930)
- Pioneer Water Well (donated by Lions Club in 1946)

- Pioneer Granary (built in 1874, donated by Nelson family)
- Ten Commandments Monument (donated by Fraternal Order of Eagles in 1971)
- September 11 Monument (project of local Eagle Scout)
- Pioneer Flour Mill Stone (used in first flour mill in town, donated by Joe Davis)

Mills Decl. ¶ 6 (JA 99-102); Mills Dep. at 11-12, 18-19 (JA 168-69, 173-74).

The city owns and controls all of the items permanently displayed in Pioneer Park.[2] It is undisputed that the city, through its city council, has the power to determine which monuments, plaques, or memorials will be permanently displayed on city park property. *E.g.*, Plaintiff's Statement of Undisputed Facts (Doc. 11) ¶¶ 6, 8 (JA 50-51) (city, through city council, determines placement of monuments on city property). Respondent Summum does not assert that any private party has the authority to erect permanent displays on city property.

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[2] *E.g.*, Danklef Dep. at 44:

Q. If the Eagles [the donors of the Ten Commandments Monument] came to you and said we no longer want to maintain this display, remove it, would they have the right to do that?

A. I don't think so.

Q. So you think that the city controls whether or not that monument stays or remains in the park?

A. They do.

b. Summum's Proposed Monument

Respondent Summum is a self-described "corporate sole and a church," founded in 1975, with its headquarters in Salt Lake City, Utah. JA 13. In 2003, and again in 2005, Summum, through its president Summum Ra, wrote to respondent Jim Dankleff, then mayor of Pleasant Grove, requesting permission to erect a monument in Pioneer Park. JA 57-60, 63-64. The Summum monument would contain the "Seven Aphorisms of Summum." Summum specifically requested that its Seven Aphorisms monument be "placed near the Ten Commandments monument . . . under the same conditions, rules, etc. under which the Eagles' [Ten Commandments] monument was and is permitted" in the park. JA 58.

The city denied Summum's request. In a letter dated November 19, 2003, the Mayor explained that the objects on display in Pioneer Park either "directly relate to the history of Pleasant Grove" or "were donated by groups with long-standing ties to the Pleasant Grove community" which "have made valuable civic contributions to our city for many years." The Mayor explained to Summum that "your group does not meet either of our criteria." JA 61-62.

In 2004, Pleasant Grove adopted, by resolution, a written policy governing (*inter alia*) acceptance and placement of permanent displays in city parks. Pet. App. H. This policy set forth both the process and the criteria for city action. The written criteria reiterated the factors of historical relevance or donation by a civic group with strong community ties. The policy also directed the city council to consider such factors as

aesthetics, clutter, and safety. The council was authorized to make the final determination.

According to the mayor and the city administrator, the city's prior unwritten criteria were essentially identical to those formalized in the written resolution. *See* Danklef Dep. at 9 (JA 132-33); Mills Dep. at 26, 29 (JA 179, 181).

Summum concedes that, in fact, its monument proposal does not meet the city's criterion of historical relevance or established community ties.[3]

3. Course of Proceedings

a. District Court

Respondent Summum filed suit in the U.S. District Court for the District of Utah on July 29, 2005, against petitioners Pleasant Grove City, its mayor, city administrator, current city council members, and two former city council members. Summum alleged that the city's denial of Summum's request to erect its Seven Aphorisms monument in Pioneer Park violated the "free expression provision" of the First Amendment. Cplt. at 8 (JA 19). Summum did **not** make any claim under the Free Exercise or

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[3]Indeed, Summum has stipulated to this fact. *See* Plaintiff's Stipulation of Fact (Doc. 152) ("admitting [Summum] does not factually meet the City's criteria" of historical relevance or local ties as articulated in the written policy). *See also id.* at 2 ("This Stipulation is binding for all purposes (pre-trial and trial) in this action").

Establishment Clauses of the First Amendment.[4] Summum sought damages (voluntarily capped at $20), declaratory relief, and an injunction ordering that the city "immediately allow plaintiff SUMMUM to erect its monument." *Id.* at 11-12 (JA 22).

After the city and the mayor filed answers, Summum filed three motions, seeking (1) partial summary judgment, (2) temporary injunctive relief (*viz.*, a temporary restraining order and a preliminary injunction allowing Summum to "immediately erect a monument comparable to the Ten Commandments monument in the relevant city parks"), and (3) judgment on the pleadings (as to certain affirmative defenses).

The city opposed the motions and filed declarations from respondent Frank Mills (JA 98), city administrator, and Terry Carlson (JA 93), former head of the local Eagles branch. Summum subsequently filed (JA 125) the deposition transcripts of respondents Mills and Mayor James Danklef.

Relying exclusively upon the free speech guarantee of the federal First Amendment, Summum contended that the city "has created a public forum for the

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[4]In a different lawsuit, the Society of Separationists, represented by the same trial counsel as Summum, had brought an Establishment Clause challenge to Pleasant Grove's display of the Ten Commandments monument. *See Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005) (remanding in light of *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), and *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005)). That litigation was dismissed, with prejudice, on remand. *See* Order Granting Plaintiffs' Motion for Voluntary Dismissal Under Fed. R. Civ. P. 41(a), *Society of Separationists v. Pleasant Grove City*, No. 2:03-CV-839 BSJ (D. Utah Feb. 15, 2006).

display of permanent monuments." Reply in Support of TRO & Prel. Inj. (Doc. 20) at 3; *see also* Mem. in Support of Partial Sum. Judg. & Prel. Inj. [Pl. Mem] (Doc. 12) at 3-4. Summum proffered two alternative First Amendment theories in support of this proposition. First, Summum asserted that the relevant forum "is a public park," which "is a traditional public forum." Pl. Mem. at 3-4. Second, Summum argued that, "[i]n the alternative, the forum herein is a designated public forum." *Id.* at 4. Either way, Summum contended, strict scrutiny would apply to a "content-based" rejection of Summum's proposed monument. *Id.*

In support of its "designated public forum" claim, Summum focused initially upon the fact that the city had accepted for permanent display a Ten Commandments monument donated by the Fraternal Order of Eagles (Eagles).[5] Under binding Tenth Circuit precedent, a municipality's display of such a donated monument remains, despite municipal ownership and control, the private speech of the donor

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[5]Summum subsequently broadened its argument, contending on appeal that the City's September 11 monument -- also privately donated to the city -- opened a forum for private monuments as well, Br. for Appellant at 19-21. Thereafter, Summum further expanded its argument, asserting in a satellite lawsuit that a memorial Gingko tree and plaque, donated to honor a former city official (*see* Mills Dep. at 21-22 (JA 176)), was (along with the Ten Commandments and September 11 monuments) likewise an "expressive" monument. *See* Complaint at 5-6, ¶ 14, *Summum v. Atwood*, No. 2:06CV00996 TS (D. Utah filed Nov. 30, 2006). (The *Atwood* case has been consolidated with the present litigation. *See* Mem. Decision and Order Granting Plaintiff's Motion to Consolidate and Consolidating Cases, *Summum v. Atwood*, No. 2:06cv00996 TS (D. Utah Dec. 29, 2006).)

(here, the Eagles), thereby creating a speech forum. *See Summum v. City of Ogden*, 297 F.3d 995, 1003-06 (10th Cir. 2002). This precedent enabled Summum to assert a species of an "equal access" free speech claim. *See* Cplt. at 8, ¶ 28 (JA 19) ("refusal to provide SUMMUM access to a forum similar to that provided to the Eagles violates the free expression provision of the first amendment").

In response, the city argued that even under binding Tenth Circuit precedent, the relevant "forum" was at most "a nonpublic forum." Deft. Resp. to Mot. for TRO & Prel. Inj. (Doc. 16) at 6, 7. In such a nonpublic forum, the city contended, it was legitimate for the city to refuse permanently to erect unsolicited monuments that lacked both historical relevance to the community and a connection to an established local civic group. *Id.* at 6-8.

The district court held a hearing on February 1, 2006. At that hearing the court orally denied Summum's motions for partial summary judgment and for interim injunctive relief. Pet. App. B. The court held that there was at least a genuine issue of material fact as to the city's implementation of a "historical relevance" criterion for monument placement, thus precluding summary judgment. Pet. App. 2b-3b. Therefore, the court further ruled, Summum had not established a likelihood of success on the merits, and it would be "premature" to order the city to allow the erection of Summum's Seven Aphorisms monument. Pet. App. 3b-4b.

The court subsequently issued a written order granting in part and denying in part Summum's motion for judgment on the pleadings regarding certain affirmative defenses. Pet. App. D.

On February 22, 2006, Summum filed a notice of appeal from the denial of its motion for a preliminary injunction.

b. Tenth Circuit Panel

On appeal, Summum again relied exclusively upon the Free Speech Clause of the First Amendment. Br. of Appellant at 17-25. Summum argued that Pioneer Park is a "public forum for the display of permanent monuments," *id.* at 18, either because the park, as a public park, is a traditional public forum, *id.* at 18-19, or because by accepting and displaying a September 11 monument and the Eagles' Ten Commandments monument, the city had created a "designated public forum," *id.* at 19-21. Summum contended, *id.* at 34, that the case was controlled by circuit precedent, specifically *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002).

The city, acknowledging Tenth Circuit precedent binding on the panel, Br. of Appellees at 14, again argued that the "forum" at issue was at most "nonpublic," *id.* at 16. The city went on to note, however, that the city's display of monuments was more properly characterized as **government** speech, not **private** speech, and that consequently **no "forum"** for such expressive monuments existed in the first place. *Id.* at 16 n.3. In any event, the city argued, the city's policy of accepting only monuments either with historical relevance to the community or when donated by groups with strong local ties passed constitutional muster. The city added that Summum's legal theory would convert Pioneer Park into a "veritable dumping ground" for monuments. *Id.* at 26.

In a decision issued on April 17, 2007, a panel of the Tenth Circuit reversed and remanded with instructions to grant a preliminary injunction allowing Summum to erect its Seven Aphorisms monument in Pioneer Park. Pet. App. A.

The panel held that because the injunction Summum requested would alter the status quo and would be mandatory, Pet. App. 6a, Summum was required to make "a strong showing" as to its likelihood of success on the merits, Pet. App. 7a (internal quotation marks and citation omitted). The panel concluded that Summum had made such a strong showing.[6]

The panel observed that "we have previously characterized a Ten Commandments monument donated by the Fraternal Order of Eagles and placed by the city on public property as the private speech of the Eagles rather than that of the city." Pet. App. 3a n.2. Hence, the panel treated this as a case about private speech in a forum, not government speech. *Id.*

The panel ruled that "the nature of the forum in this case is public," Pet. App. 11a, because a "city park" is "a traditional public forum," Pet. App. 10a. Therefore, the panel reasoned, "the city's restrictions on speech are subject to strict scrutiny." *Id.* Holding that the city's "historical relevance" criterion for

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[6]Because Summum was appealing the denial of a preliminary injunction, the Tenth Circuit also addressed the other equitable factors governing such relief. A proper showing on those factors, while necessary to Summum's appeal, is not sufficient for Summum to obtain such relief. If this Court agrees that Summum has not shown a likelihood of success on the merits, Summum's appeal would fail without any need to address the remaining factors, namely, the balance of equities and the public interest.

determining which monuments or memorials to install was "content based," Pet. App. 14a, the panel concluded that the city's refusal to erect Summum's Seven Aphorisms monument likely failed strict scrutiny both for want of a compelling interest, Pet. App. 15a, and for want of narrow tailoring, Pet. App. 16a.[7]

c. Tenth Circuit En Banc Petition and Denial

The city petitioned for rehearing en banc. Noting that the Tenth Circuit panel had been obligated to follow previous circuit precedent[8] (specifically, the *Ogden* decision) holding that a monument donated to a city remains the private speech of the donor, not the speech of the city, the city in this case urged the Tenth Circuit to grant en banc review and overrule *Ogden*. The city contended that, because it owned and controlled the monuments erected in its park, the display of such monuments was **government** speech that created no forum for **private** speech. Moreover,

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[7]The panel noted that the city still had the option to "ban all permanent displays of an expressive nature by private individuals." Pet. App.18a. But under Tenth Circuit precedent, **any** donated monuments can be deemed speech by private individuals. *See* Pet. App. 3a n.2; *Ogden*, 297 F.3d at 1003-06. Hence, this "option" is tantamount to saying a city must either refuse and remove all donated monuments from city parks, or else accept and display monuments from all comers.

[8]"We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam) (and cases cited). *Accord United States v. Austin*, 426 F.3d 1266, 1278 n.4 (10th Cir. 2005) (and cases cited).

the city pointed out that the panel decision would have all manner of untoward consequences, by establishing an "equal access" rule for permanent monuments.

On August 24, 2007, the Tenth Circuit denied en banc rehearing by an equally divided, 6-6 vote.[9] Pet. App. F.[10] Two judges wrote dissenting opinions, while the author of the original panel decision wrote a response to the dissents.

Judge McConnell, joined by Judge Gorsuch, faulted the panel's legal reasoning and lamented the harmful consequences of the panel decision for government-run parks:

> [The panel] hold[s] that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection of privately-donated monuments in their parks. If they allow one private party to donate a monument or other permanent structure, judging it appropriate to the park, they must allow everyone else to do the same, with no discretion as to content -- unless their reasons for refusal rise to the level of "compelling" interests . . . This means that Central Park in New York, which contains the privately donated Alice in Wonderland statu[]e, must now allow other persons to erect

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[9]Judges Lucero, O'Brien, McConnell, Tymkovich, Gorsuch, and Holmes voted for rehearing en banc. Chief Judge Tacha and Judges Kelly, Henry, Briscoe, Murphy, and Hartz voted to deny en banc review.

[10]The denial of rehearing in this case was consolidated with the denial of rehearing in a similar case, *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007), *petition for cert. filed*, No. 07-690 (U.S. Nov. 21, 2007).

> Summum's "Seven Aphorisms," or whatever else they choose (short of offending a policy that narrowly serves a "compelling" governmental interest). Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter.

Pet. App. 10f.

> A city that accepted the donation of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument -- or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag.

Pet. App. 11f.

Judge McConnell explained that the traditional public forum status of a park does **not** mean that "city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties." Pet. App. 11f. Noting that the city did not "invite private citizens to erect monuments of their own choosing in these parks," Judge McConnell reasoned that "[i]t follows that any messages conveyed by the monuments they have chosen to display are 'government speech,' and there is no 'public forum' for uninhibited private expression." Pet. App. 11f-12f. Indeed, because the city "owned" and "exercised total 'control' over the monuments," Judge McConnell explained, the city "could have removed them, destroyed them, modified them, remade them, or . . . sold them at any time." Pet. App. 14f.

"Once we recognize that the monuments constitute government speech," Judge McConnell continued, "it

becomes clear that the panel's forum analysis is misguided." Pet. App. 15f. "The government may adopt whatever message it chooses -- subject, of course, to other constitutional constraints, such as . . . the Establishment Clause," Judge McConnell observed. *Id.* "[J]ust because the cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing." Pet. App. 16f.

Judge McConnell concluded that the panel decision is "incorrect as a matter of doctrine and troublesome as a matter of practice." Pet. App. 17f. "[T]he error in this case is sufficiently fundamental and the consequences sufficiently disruptive that the panel decision[] should be corrected." *Id.*

Judge Lucero, in a separate dissent, explained that a park, while a traditional public forum for many purposes, is **not** a public forum for the placement of monuments. Pet. App. 5f-7f. Judge Lucero protested that the original panel "has given an unnatural reading to the traditional public forum doctrine [which] binds the hands of local governments as they shape the permanent character of their public spaces." Pet. App. 9f. He concluded:

> The panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them. Because I believe the panel's legal conclusions are incorrect, and that its decisions will impose unreasonable burdens on local governments in this circuit, I would grant rehearing en banc.

Id.

Chief Judge Tacha, author of the original panel decision, took the "unprecedented step of responding to the dissents" in her own separate opinion. Pet. App. 18f. She rejected the significance of any distinction between "transitory and permanent expression" (e.g., leaflets vs. monuments) "for purposes of forum analysis," *id.*; nor, for her, did the "type of speech" (e.g., leaflets vs. monuments) matter, Pet. App. 18f-19f. Indeed, Chief Judge Tacha insisted, "the only question properly before the panel" was whether the city "could constitutionally **discriminate**" against other private speakers. Pet. App. 19f n.1 (emphasis in original). She specifically rejected the contention that this was a "government speech" case: "the appropriate inquiry is whether the government controls the content of the speech at issue, that is whether the message is a government-crafted message." Pet. App. 22f. Here, because the city had not itself prescribed the messages on the Ten Commandments monument, the city's selection, ownership, and control of this and other monuments did not suffice, in her view, to make the city the speaker in the selection and placement of permanent monuments. Pet. App. 20f-22f. Finally, Chief Judge Tacha voiced concern at the prospect that a government could adopt a message on a monument without any political accountability. Pet. App. 23f, 25f-27f. She did not explain, however, why the city council in this case (or any other case) would not be as politically accountable for its votes on monument placement as it would be for any other votes.

d. Tenth Circuit Stay of Mandate

On August 29, 2007, the city moved to stay the Tenth Circuit's mandate pending a petition for a writ of certiorari. On September 5, 2007, the Tenth Circuit panel stayed its mandate. Pet. App. E. (Proceedings in the district court have also been stayed. *See* Order (D. Utah May 2, 2007) (Doc. 257) (JA 202).)

SUMMARY OF ARGUMENT

The Tenth Circuit held that a donated monument which is owned, controlled, and displayed by a municipality remains the **private** speech of the original donor, not **government** speech. Moreover, the Tenth Circuit held that the placement of donated monuments in a government-owned park creates a "public forum" for monuments.

Under the Tenth Circuit's ruling, every state or local government that displays a memorial originally donated by a private entity "must either remove the . . . memorials or brace themselves for an influx of clutter." Pet. App. 10f (McConnell, J., dissenting from denial of rehearing en banc).

The analytical misstep in the decision below occurred at the starting gate. When private speakers have the right to use government property to speak their own message, there is a speech forum. But when, as here, the government selects permanent displays, conveying the government's chosen theme, for erection on government land, the selection of objects for display in that park is **government speech**, not private speech. No "forum" for private speech is thereby created.

The Tenth Circuit also embraced a deeply flawed "forum" analysis in this case. At the outset, the court incorrectly identified the relevant forum as the physical park itself, instead of the city's selection process for displaying monuments in the park. Under this Court's precedents, it is the **access sought**, and not the physical setting, that defines the pertinent forum.

The Tenth Circuit compounded this error by holding that a city park is a traditional public forum for unattended private monuments. Nowhere has this Court suggested that private entities have a First Amendment right to insist that a government erect and display on government property the permanent monument of that group's choosing. To the contrary, this Court's precedents point decisively in the opposite direction.

Nor can Summum find support elsewhere in this Court's forum doctrine for Summum's novel "right to impose a monument upon a city."

The decision below threatens to wreak havoc upon governments at every level in their ability to control the permanent physical occupation of government land. Given the ubiquity of governmental bodies displaying donated monuments on public property, *see e.g.*, Pet. App. I -- from the Statue of Liberty on down -- a host of federal, state, and local government bodies would be, under the Tenth Circuit's logic, sitting targets for demands that they cede piece after piece of government land to forced occupation, by any group, with whatever monuments that group wishes to have installed, be it Summum's Seven Aphorisms, PETA's suffering circus elephant, or Rev. Fred Phelps's denunciations of homosexual persons.

This Court should reverse the Tenth Circuit's decision.

ARGUMENT

The Tenth Circuit in this case reached the extraordinary and unprecedented conclusion that every private party has a First Amendment right to force a municipality to erect in its park the permanent, unattended monument of the private party's choosing, absent a compelling interest to the contrary. This ruling rests upon two deeply flawed premises: first, that a privately donated monument remains private speech despite the government's ownership and control -- and selection for display -- of that monument; and second, that because a city park is a traditional public forum, it is also a public forum for the deposit of private, unattended, permanent monuments. This Court should reverse the judgment below.

I. PLEASANT GROVE'S SELECTION AND DISPLAY OF MONUMENTS IN PIONEER PARK IS GOVERNMENT SPEECH TO WHICH SUMMUM HAS NO FIRST AMENDMENT RIGHT OF ACCESS.

Governmental bodies routinely decide what objects to select to adorn government property. The First Amendment confers no right for private entities to force the government to display the private parties' own preferred objects. The Tenth Circuit ruled to the contrary. This Court should reverse.

The Free Speech Clause of the First Amendment protects against government restriction of private

speakers. By contrast, when the government leaves private speakers alone and speaks for itself, the Free Speech Clause does not apply. This Court's jurisprudence therefore recognizes a crucial distinction between **government** speech and **private** speech for First Amendment purposes. *See, e.g., Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 559 (2005) (compelled speech); *Board of Educ. v. Mergens,* 496 U.S. 226, 250 (1990) (plurality) (Establishment Clause); *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 765-66 (1995) (plurality) (same). In particular, when the government restricts **private** speech, an array of constitutional free speech protections comes into play. By contrast, when the **government** speaks, it generally can select the precise message or messages it wishes to deliver. *See generally Rust v. Sullivan,* 500 U.S. 173, 194 (1991); *Rosenberger v. Rector of Univ. of Va.,* 515 U.S. 819, 833 (1995); *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 541-42 (2000). "[T]he Government's own speech . . . is exempt from First Amendment scrutiny." *Johanns,* 544 U.S. at 553.

In analyzing Summum's assertion of a Free Speech violation, then, the first question must be whether this case is about **private** speech or **government** speech.

The decision below reflects the erroneous rule in the Tenth Circuit that, when a city accepts and erects for permanent display a monument donated by a private entity, that monument remains the **donor's** private speech despite the government's ownership, control, and independent decision to display the monument. *See* Pet. App. 3a n.2; *Summum v. City of Ogden,* 297 F.3d 995, 1003-06 (10th Cir. 2002);

Summum v. Callaghan, 130 F.3d 906, 919 & n.19 (10th Cir. 1997); *Summum v. Duchesne City*, 482 F.3d 1263, 1269, 1273-74 (10th Cir. 2007). As a consequence, in the Tenth Circuit, a city's decision **not** to erect a private entity's proposed monument triggers First Amendment scrutiny. Pet. App. 10a.

The Tenth Circuit's analysis is deeply flawed.

A. Pleasant Grove May Speak in Its Own Voice, Free From Any Constitutional Obligation to Incorporate Different Messages or Viewpoints.

The Constitution recognizes that Pleasant Grove can speak in its own voice, without any concomitant constitutional duty to incorporate private speech into its message. Indeed, the general rule is that, when the government speaks, "it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833; *see also Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"). The only limits to the government's autonomy of expression are those dictated by independent constitutional constraints on specific messages, like the Establishment Clause. *See, e.g.*, *Mergens*, 496 U.S. at 250 (plurality).[11]

Governments at all levels routinely engage in a wide variety of speech that expresses particular viewpoints, from displaying monuments (many of them

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[11]Summum has not raised any federal Establishment Clause challenge in this case. *See supra* note 4 and accompanying text.

donated) like the Statue of Liberty and the Vietnam Veterans Memorial, to posting flyers declaring that "Uncle Sam Wants You" or "Only You Can Prevent Forest Fires," to inveighing against the illegal use of drugs and drunken driving, to promoting the consumption of beef or the conservation of water.

When government conveys such messages in its own voice, as Pleasant Grove has done here, it has no obligation to provide an equivalent platform for private speech. To hold otherwise would wrest control over the message out of the hand of the speaker -- the government -- and into the hands of "any contingent . . . with a message," with the result that what originated as speech of Pleasant Grove would, in the end, "be shaped by all those . . . who wished to join in with some expressive demonstration of their own." *Hurley v. Irish-American GLIB*, 515 U.S. 557, 573 (1995). But the First Amendment does not force government to choose between cacophony or silence. *Arkansas Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 681 (1998); *see id.* at 675 ("the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming"). To the contrary, when the government itself is speaking, it can "ensure that [the government's] message is neither garbled nor distorted." *Rosenberger*, 515 U.S. at 833.

B. Pleasant Grove's Selection of Monuments for Display on Public Land Is a Well-Established Form of Government Speech.

1. Governments commonly speak through displays on their own land.

Governments have selected and controlled the erection of monuments and other forms of unattended displays on public land from time immemorial. *See, e.g.*, Britannica Online Encyclopedia, *Triumphal Arch*, www.britannica.com/EBchecked/topic/606106/triumphal-arch (listing monuments erected by early Roman leaders); *United States v. Gettysburg Elec. R.R. Co.*, 160 U.S. 668, 682 (1896) ("Can it be that the government is without power to preserve the land . . . [and] erect the monuments . . . for the benefit of all the citizens of the country for the present and for the future? . . . It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there . . ."). [12] The process of including and excluding or removing such displays embodies a matrix of complex governmental judgments and policy choices concerning aesthetics, community values and policies, and preserving public land for its intended purposes and public enjoyment. *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 289-90 & n.1, 296-98

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[12] *See also* Metropolitan Museum of Art, *From Model to Monument: American Public Sculpture, 1865-1915*, www.metmuseum.org/toah/hd/modl/hd_modl.htm ("The earliest commissions for public monuments in the United States date to the late eighteenth century").

(1984) (describing interests governing park management).

A government's selection of monuments for inclusion or placement can reflect an officially designed theme and message related to history (such as the National Mall's collection of monuments to significant developments in American governmental history, *see Friends of the Vietnam Veterans Mem. v. Kennedy*, 116 F.3d 495, 495-96 (D.C. Cir. 1997)), culture, art, or significant events in or contributions to the community. Such a display is a form of government speech, just as a similar display on private land would be private speech. The governmental message embodied in such displays may be an official statement of respect for history and those who made it, the honoring of important individuals or entities in the community, a celebration of culture, or a tribute to the defining significance of events or organizations to a community. Indeed, "[t]hroughout the ages, public sculptures have served as didactic tools, offering moral, patriotic, and cultural instruction." Metropolitan Museum of Art, *supra* note 12; *cf.* S. Levinson, *Written in Stone: Public Monuments in Changing Societies* 87 (1998) ("Public monuments that designate communal heroes or sacred communal events throughout time have been ways by which regimes of all stripes take on a material form and attempt to manufacture a popular consciousness conducive to their survival").

In this case, as its very name reflects, Pioneer Park is dedicated to acknowledging and celebrating the Mormon pioneer heritage, other historic influences, and the local civic groups who over time have helped to develop and define the community. Pet. App. 2a; *see*

also supra p. 3. To that end, Pleasant Grove has chosen to display a number of privately donated monuments that reflect that message, including "one of Pleasant Grove's first granaries, its first city hall, and its first fire department building." Pet. App. 2a. The city will consider displaying monuments offered to it only if they "directly relate to the history of Pleasant Grove and have historical relevance to the community," or if they are "donated by an established Pleasant Grove civic organization with strong ties to the community" or "a historical connection with Pleasant Grove City." Pet. App. 2h-3h. Thus, the city's display of selected monuments in Pioneer Park is a means by which Pleasant Grove expresses the city's chosen theme: recognition of the history, events, and persons who have defined Pleasant Grove's identity as a community.

2. Pleasant Grove properly formulated its message through the selective inclusion of monuments created by others.

a. A compendium of private speech is a distinct form of expression.

Pleasant Grove's chosen theme of community history remains distinctly its own message, even though the city speaks through the compilation of individual displays originally created by others.

This Court has long recognized that the selective inclusion and exclusion of speech -- a process that itself defines an overarching message through the exercise of editorial control and judgment -- is a vital aspect of

government speech, including where **private** speakers were the **original** sources of speech, but the **government** made the **ultimate** editorial judgment.

For example, this Court has noted the role of governmental discretion in "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, . . . a public school prescribing its curriculum," and "a public broadcaster exercis[ing] editorial discretion in the selection and presentation of its programming," *Forbes*, 523 U.S. at 674. Similar observations of this common-sense proposition appear in other cases. *See, e.g., United States v. American Library Ass'n*, 539 U.S. 194, 208 (2003) (plurality) (noting library's "traditional role in identifying suitable and worthwhile material"); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998) (noting government agency's role in selecting certain expressive works); *id.* at 611 (Souter, J., dissenting) ("if the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, he is free to prefer George Washington over George the Third") (footnote omitted). *Cf. Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality) ("[N]othing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools") (emphasis omitted); *id.* at 889 (Burger, C.J., joined by Powell, Rehnquist, & O'Connor, JJ., dissenting) (schools "ought not to be made a slavish courier of the material of third parties"). In each of these situations it is the **government** that is voicing its opinion that the selected items are "worthy" under whatever editorial criteria the government is employing (e.g., "newsworthiness" or "educational value" or "artistic excellence").

That the items the government selects may have private origins does not mean that the private sources are the ones who are speaking through the selection process. For example, while *The Great Gatsby* is admittedly not government speech, Pet. App. 20f, the **selection** of that book for placement on a public library's shelves is **government speech**. F. Scott Fitzgerald (were he still alive) could neither insist on the book's inclusion, nor demand the stocking of multiple copies, nor object to its removal from the shelves to make way for the latest Harry Potter book.

Similarly, this Court has "permitted the government to regulate the content of what is or is not expressed when it is [itself] the speaker **or when it enlists private entities to convey its own message**." *Rosenberger*, 515 U.S. at 833 (emphasis added). For example, since the 1940s, government agencies have utilized the Ad Council, a private, non-profit organization that produces and distributes public service campaigns, to help formulate and disseminate a particular government message. Ad Council, *About Ad Council*, www.adcouncil.org/default.aspx?id=68. Some of the more recognizable examples of government speech produced by the Ad Council include: Rosie the Riveter (Office of War Information, War Manpower Commission); Smokey Bear and "Only You Can Prevent Forest Fires" (USDA Forest Service, National Association of State Foresters); and "You can learn a lot from a dummy . . . Buckle your safety belt" and "Friends Don't Let Friends Drive Drunk" (U.S. Department of Transportation, National Highway Traffic Safety Administration). Ad Council, *Historic Campaigns*, www.adcouncil.org/default.aspx?id=61. That the government has "enlist[ed a] private entit[y]

to convey its own message," *see Rosenberger*, 515 U.S. at 833, does not alter the nature of the message as **government** speech. Where the government "sets the overall message" and "approves every [item]," it "is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources," *Johanns*, 544 U.S. at 562.

The petitioner Pleasant Grove City owns and controls the permanent monuments and memorials displayed in Pioneer Park. That some of these objects bear messages originally inscribed by private parties thus does not derogate from the fact that the placement and display of these **government**-owned, **government**-controlled objects on **government** property represents **government** speech.

It follows that a city's selection of which items to display in a park -- like its selection of decorations for government buildings -- is government speech, and no private entity can claim a "Me too!" right of access for its own preferred displays. As the DC Circuit aptly wrote:

> [P]ublic forum principles are out of place . . . when [government] authorities engage in government speech by installing sculptures in the park. If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statute of Robert E. Lee.

PETA v. Gittens, 414 F.3d 23, 28-29 (D.C. Cir. 2005) (internal quotation marks and citations omitted).

b. The Tenth Circuit's focus on a particular monument exemplifies that court's flawed approach.

In its ruling, the Tenth Circuit declared that "[f]or purposes of this appeal, the most important structure [in Pioneer Park] is a Ten Commandments monument, donated by the Fraternal Order of Eagles in 1971," Pet. App. 2a. The Tenth Circuit's focus on this monument, however, as an instance of supposedly private speech taking place in Pioneer Park, perfectly exemplifies the Tenth Circuit's erroneous analysis.

Far from passively allowing or permitting the Eagles to display its own monument in Pioneer Park, the record makes it abundantly clear that the city **chose** to accept and display (including where to display), **for its own purposes**, the monument donated by the Eagles: (1) the monument was donated by the Fraternal Order of Eagles to Pleasant Grove City, Carlson Decl. ¶ 15 (JA 97); (2) the monument was accepted by the City, City Minutes of Mar. 1, 1977 (JA 123) (noting that "Mayor Cook stated that a letter be written to the Fraternal Order of Eagles accepting the monolith of 'The Ten Commandments' and stating it would be placed in a prominent place in the Rose Garden Park"); and (3) the monument was erected "with the specific permission and approval of Pleasant Grove and its governing council," Plaintiff's Statement of Undisputed Facts ¶ 10 (JA 51). Moreover, at the public ceremony unveiling the monument in May 1971, Mayor Cook stated he believed it "would serve to remind citizens of their pioneer heritage in the founding of the state." Carlson Decl. ¶ 15 (JA 97); Mills Decl. ¶ 10 (JA 103).

Pleasant Grove's selection of the Ten Commandments monument, like its selection of the other displays in Pioneer Park, reflects an editorial judgment about what aspects of the community's heritage merit acknowledgment, *see* Pet. App. 2h, a message that is no different from the federal government's selection of monuments of national historical significance for inclusion on the National Mall. That governmental message, moreover, is reflected not only in the historic and civic criteria that displays must meet to be considered for display, but more importantly in the City's independent "final determination as to whether the item shall be accepted and where the item shall be placed," Pet. App. 4h. As in *Johanns*, Pleasant Grove not only "oversees" the Park's management and "prescribe[s]" the "basic message" for displays, but also "retains absolute veto power" over the erection of any monument. 544 U.S. at 563. That control ensures that the message of the Park display remains the government's. *Id.* at 560 (finding government speech where "[t]he message of the promotional campaigns is effectively controlled by the Federal Government itself") Indeed, it is the very act of selection -- deciding to include and exclude displays -- that gives shape to Pleasant Grove's message about the influences that were important in its history and community. Were Summum or others entitled to compel the erection of displays that have no connection to the community or its history, Pleasant Grove's message celebrating the community's orgins and influences would be "garbled []or distorted," lost amid the clutter of disjointed and disconnected displays, *Rosenberger*, 515 U.S. at 833.

c. The government's speech is the selection of the material to include, and not necessarily the content of particular items.

The court below got off on the wrong foot when it focused on the **message inscribed** on the monument rather than the **selection and display** of the monument. The latter -- plainly an instance of government speech -- is the proper focus.

This is **not** a case in which the government has erected blank monuments and invited private speakers to inscribe their own message. *Compare Tong v. Chicago Park Dist.*, 316 F. Supp. 2d 645 (N.D. Ill. 2004) (private persons entitled to purchase message space on blank bricks installed on walkway in government park). Rather, Summum seeks to elbow its way into the municipal authority over park management. The "speech" in question is therefore the **city's display of monuments.**[13]

Summum's, focus upon the particular **inscription** on a monument, *e.g.*, Br. in Opp. to Cert. at 12, 17, 19, as if that inscription exhaustively defined the relevant speech, makes no sense. A government may select monuments for a given park or plaza based upon such criteria as aesthetics, historic significance, or local ties, without necessarily subscribing to the precise messages engraved thereon. For example, a city in

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[13]The relevant "forum" for speech, if any, must be identified by "the access sought by the speaker," *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). Logically, then, the nature of the "speech" in question must likewise be determined by the access sought.

Kansas or West Virginia could accept and display a memorial to abolitionist John Brown, containing excerpts of his writings, without embracing the radical measures endorsed in those writings. Or a city (say, New York in its Central Park) could establish a "diversity" display reflecting the vibrancy of political debate in America; donated monuments would contain positively contradictory inscriptions. The government would not in such cases forfeit the right to select which monuments to display just because the particular messages chiseled onto the various objects might not coincide with the government's own message in selecting the items for display.

Summum fails to appreciate that government speaks by the **selection** of works for display, and not necessarily by embrace of the particular words inscribed thereon. An object may have constituent appeal, or tourism value, or simply be visually attractive to the city authorities wholly apart from any official "agreement" with any inscriptions on the monument. How else to explain such displays as the Alice in Wonderland sculpture in Central Park?

The government's display of monuments (or other objects) on government property, is, to the extent it is speech at all, **government** speech. To be sure, a private entity may **propose** a particular display, and even offer to assume the burden of supplying and erecting the display. But the ultimate judgment call rests with the government.

Thus, when an artist donates a sculpture for the decoration of a municipal lobby or plaza, that sculpture becomes a **government** display, regardless of its private source. The government can thereafter move, discard, warehouse, or replace the sculpture.

See, e.g., Serra v. United States Gen. Servs. Admin., 847 F.2d 1045 (2d Cir. 1988). This is entirely different from, say, a temporary display of schoolchildren's posters in a government hallway, which may open a temporary forum for the children's private speech.

Likewise, when a city museum acquires a work of art, it is the city that speaks (the message being, this is a piece of art we find aesthetically attractive, historically significant, etc.); the creator of the work no longer controls the display. No forum has been created, and no competing artist can insist, with the force of a constitutional right, on "My turn!"

When a municipality takes ownership and control of a monument and chooses to display it in a park, as here, it is now the municipality that speaks (the message being, we think this monument reflects our history, or sends a valuable message, or will attract tourists, etc.). The private donor can boast of its contribution, to be sure, but the donor is no longer the constitutionally relevant speaker. No other private donors can insist that the government accept their additional monuments so that they can be speakers, too.

d. Pleasant Grove's role in displaying monuments on its property fits comfortably into this Court's government speech doctrine.

In concluding that Pleasant Grove was constitutionally obligated to invite Summum (and any other member of the public) to join in its display, the court of appeals stressed (Pet. App. 13a n.4) that Pleasant Grove was not "acting in its capacity as

librarian, television broadcaster, or arts patron." *See also id.* at 21f. That is irrelevant.

There is nothing talismanic about the court of appeals' designated categories. The government was not acting as a librarian, broadcaster, or arts patron in *Johanns* or *Rust* either, but this Court nevertheless held that the federal government was engaged in speech, to which it need not admit contrary views. *See Johanns*, 544 U.S. at 562-67; *Rosenberger*, 515 U.S. at 833; *Rust*, 500 U.S. at 193. That is because the question under the Free Speech Clause turns not on the particular governmental function, but on whether the government is "abridging" private speech by regulating or discriminating against "private speakers who convey their own messages," or whether instead government is simply speaking for itself. *Rosenberger*, 515 U.S. at 834-35. The protection of the Free Speech Clause against abridgement is, after all, fundamentally a right to be left alone in speaking, not a right to affirmative governmental assistance. *See Hurley*, 515 U.S. at 573 (noting that speaker "autonomy" is "the fundamental rule of protection under the First Amendment"); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 14-18 (1986) (forcing private utility to carry the speech of another in the extra space of a billing envelope violates the First Amendment). There certainly is no First Amendment right to "*de facto* beneficial ownership of some rather spacious tracts of public property" to erect permanent monuments. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988); *cf. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (no First Amendment right to sleep in symbolic tents within a national park).

Here, Pleasant Grove has done nothing to regulate or prevent Summum's display of its own monument on its own property or on that of any other willing property owner. Nor has the government limited in any other respect Summum's ability to speak, proselytize, or otherwise inform the public about the Seven Aphorisms. Pleasant Grove simply decided to commemorate the community's history and civic heritage by displaying its own monuments on its own land. That is government speech just as Summum's display of its monument on its land would be Summum's speech. Pleasant Grove's related decision not to permit Summum to force its own message on the government does not change that, because the First Amendment "do[es] not divest the Government of its right to use what is, after all, its land." *Lyng*, 485 U.S. at 453 (emphasis added).

3. Pleasant Grove incorporated the private donations into its own speech.

The Tenth Circuit holds that donated monuments owned by a city and erected on its land are not the City's speech, but remain the private speech of the donors, because the City has not created the monuments, but instead has accepted them fully formed from private donors. *See, e.g., Summum v. City of Ogden*, 297 F.3d 995, 1004 (10th Cir. 2002) ("[T]he City of Ogden maintained no editorial control over the design and creation of the Monument. Rather, the Eagles exercised complete control over the content of the Monument, turning over to the City of Ogden a completed product") (cited and followed at Pet. App.

9a, 11a). *See also* Pet. App. 22f (Tacha, J., response to dissent) ("the appropriate inquiry is . . . whether the message is a government-crafted message"). That makes no sense.

First, that rationale defies reality. Gilleo's display of a political campaign sign was her speech, regardless of whether she made it herself or if the campaign crafted the message, Pet. App. 22f, and then donated it to her. *See City of Ladue v. Gilleo*, 512 U.S. 43 (1994). So too, an individual's decision to display a Picasso painting or a Renoir sculpture in a house is the speech of the owner, even though the item's content was designed without the owner's input or control, *see* Pet. App. 22f.

Pleasant Grove's decision to accept the donation of the monument from the Eagles, and to incorporate the monument within a public space containing other historical objects, items, and monuments, is functionally, and legally, no different than a private property owner's exercise of discretion and exclusive choice in decorating his or her private space. As this Court has noted, "[a]t some point, the government's relationship to things under its dominion and control is virtually identical to a private owner's property interest in the same kinds of things, and in such circumstances, the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 n.31 (1984) (internal quotation marks and citation omitted).

The lower court's reasoning also overlooks the budgetary constraints that commonly force governments (small and large) to leave the creation of

public art in the hands of private donors. What is more, if endorsed, the court of appeals' approach would make the government's display of the Statue of Liberty the speech of France, not the United States, entitling others to erect counter-monuments. Likewise, the Vietnam, Korean, World War II, and upcoming Martin Luther King, Jr., monuments in the nation's capital would likely be deemed private speech, not government speech, entitling Summum and everyone else with a monument to occupy their own corner of the National Mall.

Finally, focus on the text of the Ten Commandments monument in isolation ignores the governmental message communicated by the Pioneer Park display as a whole, of which the Ten Commandments monument is just one part. The government speech at issue here is the commemoration of history and civic contributions that is embodied in the composite display in Pioneer Park.

The questions the court of appeals should have asked, instead, are:

> (i) whether Summum had any right to insist that government speech incorporate its message -- the answer to that is, as set forth above, plainly no; or,
>
> (ii) whether private individuals have any First Amendment right to erect unattended displays on public land -- the answer to that is also plainly no. *Infra* § III.

The central premise of Summum's Free Speech claim is that the city is letting private speakers speak through monument placement. The speech in question

is government speech, however, so Summum's Free Speech claim must fail.[14]

Summum has no likelihood of success on its Free Speech claim; hence, Summum has no entitlement to a preliminary injunction ordering the city immediately to allow Summum to erect its proposed monument in Pioneer Park.

II. PIONEER PARK IS NOT A FORUM FOR PRIVATE, PERMANENT MONUMENTS.

The recognition that the selection and display of monuments in Pioneer Park is government speech should end this case: there is no forum for private speech through monuments, and thus Summum can claim no First Amendment right to force the city to erect Summum's proposed monument.

Nevertheless, the Tenth Circuit's aberrant forum analysis requires additional attention. That court treated Summum's proposed monument as a private speaker's attempt to speak, through a permanent, unattended monument, in a public park. Even if the display of every other monument in the park were properly recognized as government speech (as this Court should do), and indeed even if there were no

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[14]Chief Judge Tacha voiced concern that if the government speech doctrine applied to the selection and display of monuments, political accountability might be lacking. Pet. App. 23f, 25f-27f. But as this Court has explained, "when the government speaks, . . . it is, in the end, accountable to the electorate and the political process . . . . If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

other monuments in the park at all, a would-be private speaker would nevertheless have a theoretically independent (albeit meritless) claim to communicate, **as a private speaker**, by depositing a message-bearing monument in the park. To all appearances, Summum has made precisely such a claim in this case. *E.g.*, Pl. Mem., *supra* p. 8, at 3-4 (arguing that Summum's proposed monument is protected private speech in a traditional public forum); Br. of Appellant at 18-19 (same). The Tenth Circuit, in turn, embraced this argument. Pet. App. 9a-11a. It is therefore necessary to explain why, under this Court's forum analysis, this argument must fail.

This Court's Free Speech Clause jurisprudence subjects restrictions on private speech to differing levels of scrutiny depending on whether a "speech forum" exists and, if so, the nature of the forum involved. In particular, this Court distinguishes between "public fora" (whether "traditional" in nature, like sidewalks and parks, or instead "designated" by the government's deliberately opening a venue for private speech), and "nonpublic fora." In public fora, content-based limitations trigger strict scrutiny, while in nonpublic fora, restrictions can be content-based so long as they are reasonable and viewpoint-neutral. *See generally Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983); *Forbes*, 523 U.S. at 677-78.

The Tenth Circuit erred by holding that Summum's federal free speech claim was likely to succeed under this Court's forum analysis.

A. The Tenth Circuit Erred by Holding that Pioneer Park Is the Relevant Forum.

This Court has explained that the relevant forum in a free speech case must be identified according to the nature of "the access sought by the speaker," not "merely by identifying the government property at issue." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). Here, Summum seeks, not just to put its monument into Pioneer Park, but rather **to have the city allow** Summum to erect this permanent, unattended monument. *See* JA 58 (Summum's letter requesting that Seven Aphorisms monument "be erected under the same conditions, rules, etc. under which the Eagles' monument was and is permitted and maintained"); Cplt. at 11, ¶ 3 (JA 22) (requesting "order that the **defendants** immediately **allow** plaintiff Summum to erect its monument") (emphasis added); Plffs' Statement of Undisputed Facts ¶ 10 (JA 51) (Ten Commandments monument "was erected . . . with the **specific permission and approval** of Pleasant Grove and the government council") (emphasis added). Hence, the relevant "forum," if any, is the city's internal selection and approval process for placing permanent, unattended monuments in Pioneer Park.

The Tenth Circuit erred in this crucial first step of forum analysis. The Tenth Circuit held that "[t]he permanent monuments in the city park . . . make up the relevant forum," Pet. App. 9a, and that "the nature of the forum in this case is public," Pet. App. 11a, because a "city park" is "a traditional public forum," Pet. App. 10a. Hence, the Tenth Circuit conflated the **city's internal process** for selecting which

monuments to display in Pioneer Park, with the **physical park** itself. *See also Summum v. Duchesne City*, 482 F.3d at 1269 ("it is this **physical setting** that defines the character of the forum to which Summum seeks access") (emphasis added). That rationale is wholly incompatible with *Cornelius*.

The physical park is **not** the relevant forum. Rather, the analysis must focus upon the city's process for selecting which monuments to display in its parks, which is no forum for private speech at all. Like choosing where to situate parks in the first place, or choosing what materials to use for street paving, etc., monument placement is a discretionary governmental selection process, not a forum for private speakers to communicate their views.

That the ultimate destination of a monument is a city park is no more dispositive than the fact that the fundraising in *Cornelius* would ultimately take place in government offices. 473 U.S. at 800-01.

Thus, under this Court's case law, the forum -- if any -- in this case would not be the park itself, but rather the management and selection of permanent displays in city parks. Private parties have **no** access to such management and selection -- all private parties can do is make offers of donations or volunteer their opinions -- hence, there is **no** speech forum here at all (and certainly no "public forum").

B. The Tenth Circuit Erred by Holding that a City Park is a Traditional Public Forum for Private, Unattended, Permanent Displays.

But even if the pertinent forum were Pioneer Park itself (as opposed to the city's monument selection process), the judgment below could not stand. Pioneer Park is not a traditional public forum for the deposit of unattended objects.

To be sure, a public park is presumptively a traditional public forum for personal speech activities like leafletting, carrying signs, and oral utterances. That is because "one who is rightfully [in a place] which the state has left open to the public **carries with him** there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (emphasis added). "**Such use** of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality) (emphasis added).

Summum has identified no historic tradition of depositing unapproved, unattended monuments on public parkland. Moreover, stone monuments of the type Summum proposes are not the sort of thing one "carries with him" when using a public street, sidewalk, or park. *See Capitol Square*, 515 U.S at 761 (suggesting "a ban on all unattended [private] displays" as a permissible restriction even in a traditional public forum); *id.* at 802-04 (Stevens, J., dissenting) (agreeing that "a State may impose a ban on all private unattended displays" in a public forum:

"This Court has never held that a private party has a right to have an unattended object in a public forum," as such placements "create[] a far greater intrusion on government property [compared with speaking, handbilling, etc.] and interfere[] with the government's ability to differentiate its own message").

Furthermore, an expressive activity is not subject to public forum analysis just because the ultimate expression takes place on what is physically a traditional public forum. In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), for example, the speakers posted fliers on the "horizontal crosswires supporting utility poles" along public streets and sidewalks. *Id.* at 802. This Court held that the speakers' "reliance on the public forum doctrine is misplaced." *Id.* at 814. Rather than ignore the difference between **distributing** fliers and **posting** fliers, this Court explained that the challengers "fail[ed] to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks." *Id.* Notably, this Court held that "the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." *Id.* (internal quotation marks and citation omitted).

In short, just because certain property is a public forum for some kinds of communication (leafletting, speaking) does not mean it is a public forum for other kinds of communication (posting fliers, littering leaflets, erecting monuments). *See id.* at 809-10; *Schneider v. State*, 308 U.S. 147, 160-61 (1939).

Streets, sidewalks, and parks are traditional public fora for **leafletting**, not **littering**, *Schneider*,

and **displaying** signs, not **affixing** them to government property, *Taxpayers for Vincent*. Likewise, such properties are not traditional public fora for **depositing** unattended private monuments, *Capitol Square*.

C. Pioneer Park Is Not a Designated Public Forum for Private, Unattended, Permanent Monuments.

Summum argued below in the alternative that, even if Pioneer Park is not a **traditional** public forum for monuments, the city has created a **designated** public forum by allowing other private parties to install monuments -- in particular the Ten Commandments monument and the September 11 monument. *E.g.*, Br. of Appellant at 19-21. *See also supra* note 5 and accompanying text. This argument fails as well.

Government "does not create a [designated] public forum by inaction . . . but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. Here, Summum has plainly failed to carry its burden of demonstrating any such opening. As discussed above, the "speech" entailed in the city's acceptance and placement of monuments is **government** speech, *supra* § I, so that activity is no evidence of an opening for private speech. And even if the city had allowed for selective access by a private speaker or two, *see supra* note 5, which it did not, such selective access does not suffice. "A designated public forum is not created when the government allows **selective** access for individual speakers rather than

general access for a class of speakers." *Forbes*, 523 U.S. at 679 (emphasis added).

Summum claims that the city's monument placement **policy** (Pet. App. H) entitles private parties to donate, and compel government display of, additional monuments in city parks. Br. in Opp. to Cert. at i, 5. This is plainly inaccurate. The city's internal policy sets criteria that are **necessary**, but **not** themselves **sufficient**, for acceptance and display of a proposed monument. *See* Pet. App. 2h ("approval must be obtained from the City Council"; requests are submitted "to the City Council for their consideration and acceptance or denial"), 4h ("If the item meets the above-listed criteria, then the Council shall consider the [proposal and] make the final determination as to **whether** the item shall be accepted and **where** the item shall be placed") (emphasis added).

Moreover, Summum has never asserted that the city's denial of its proposed "Seven Aphorisms" monument violated the city's policy. Indeed, Summum has stipulated that its proposal does not meet the policy criteria. *Supra* note 3. Under the policy, private entities can **propose** monuments, but the ultimate **authority** to decide whether a given monument comports with the city's overall vision for the park rests entirely with the city, as Summum has consistently acknowledged. *E.g.*, Plaintiff's Statement of Stipulated Facts ¶¶ 6, 8 (JA 50-51) (city, through city council, determined placement of monuments on city property). Summum specifically conceded, for example, that the Ten Commandments monument was erected "with the specific permission and approval of Pleasant Grove and its government council." *Id.* ¶ 10 (JA 51).

Hence, there is no designated public forum for private unattended monuments here. "[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'" *Forbes*, 523 U.S. at 679 (citation omitted). Thus, even under the Tenth Circuit's erroneous "private speech" theory, there was no designated public forum here.

D. The Standards Governing Nonpublic Fora Cannot Salvage Summum's Claim.

Pioneer Park is simply not a forum for private unattended monuments. But even if Pioneer Park were treated as a **nonpublic** forum for such monuments, Summum would fail to show any likelihood of success.

"[T]he government, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius*, 473 U.S. at 800 (internal quotation marks and citation omitted). Thus, in a nonpublic forum, restrictions on private speech need only be reasonable and viewpoint-neutral. *Id.*; *Perry*, 460 U.S. at 46. The criteria the city identified for its selection of monuments in this case easily satisfy that standard.

The city employs two principal considerations as threshold, gatekeeping requirements for proposed monuments: local ties and historic relevance. Summum concededly does not meet either of these criteria, *supra* note 3. Nor can Summum find constitutional fault with these considerations.

"Speaker identity" is a legitimate criterion for access to a **nonpublic** forum, *e.g.*, *Perry*, 460 U.S. at 49, and even for access to a **designated** public forum, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981) (student organizations). *See generally Forbes*, 523 U.S. at 680 ("with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers"). Requiring "local ties" is simply an example of a legitimate criterion based upon speaker identity.

Summum makes the rather farfetched claim that to distinguish between "local" and "nonlocal" speakers is a form of viewpoint discrimination. *E.g.*, Br. of Appellant at 24 ("Locals have local viewpoint; outsiders have an outside viewpoint"). But one's residency is no more a viewpoint-based category than is one's status as a student or a non-student, as in *Widmar*.

Historic relevance, the other main criterion, is also a reasonable, viewpoint-neutral consideration for selecting which objects to display in a public park. A municipality can surely select a theme for its decoration of public space. If New Orleans wishes to create a jazz display, Los Angeles a Hollywood display, or Cheyenne a cowboy display in a public park, no one could rightly insist on the inclusion of, say, tributes to cubist artists. Here, Pioneer Park reflects the history of its Mormon pioneer settlers. Summum has failed to show that the decision not to display monuments foreign to that history reflects anything other than the city's effort to stay on topic.

In short, the standards governing nonpublic fora offer no support to Summum.

E. Here There Is No Forum at All for Private, Unattended, Permanent Monuments.

Finally, it bears repeating that here, there is no forum at all for private speech through unattended, permanent monuments.

Not every claim of free speech requires a forum analysis or application of public forum principles. Sometimes, as this Court noted in *Forbes*, 523 U.S. at 679, there is "not a forum at all." In *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004), for example, the Court declined to use a forum analysis to evaluate a student's First Amendment claim of viewpoint discrimination because the scholarship program at issue was, in the Court's view, not intended to "encourage a diversity of views from private speakers" and therefore "not a forum for speech." *See also Am. Library Ass'n*, 539 U.S. at 204-05 (plurality) (noting that "forum analysis and heightened judicial scrutiny are incompatible" with the government acting as patron of the arts, television broadcaster, or librarian) (citing *Forbes* and *Finley*).

The decoration of Pioneer Park with unattended monuments and memorials is **exclusively** a channel for the government expression of a theme and vision for the park. Private parties who disagree with placement decisions can seek political recourse, *supra* note 14, but the First Amendment does not give them a license to intrude upon the local government's management of park property.

III. THE TENTH CIRCUIT'S APPROACH WOULD CREATE ENORMOUS PRACTICAL PROBLEMS.

The foregoing legal analysis suffices to resolve this case. Lest anything more be required, this Court need only look to the practical nightmare that would follow from embracing the decision below.

The Tenth Circuit's decision creates for every private entity a right permanently to occupy public land with the unattended object of its choosing -- at least until the land is entirely consumed by monuments. Every federal, state, or local governmental body, under this theory, would be vulnerable to lawsuits insisting upon the permanent display of a private entity's preferred monument alongside any other monument that was originally donated by a private entity. This is a matter of considerable concern: donated monuments are ubiquitous on governmental property. *See* Pet. App. I (listing examples of donated monuments in parks and other government-owned properties within the Tenth Circuit alone).

The problem is not just the Tenth Circuit's ruling that a traditional or designated **public forum for monuments** exists here. Rather, the core problem is the court's failure to distinguish between **government** speech (selecting and displaying monuments in a city park) and **private** speech. For once a forum for private speech is opened, viewpoint discrimination is constitutionally impermissible, even in a **nonpublic** forum. *Cornelius*, 473 U.S. at 806; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993). Effectively, a city cannot accept a

monument posthumously honoring a war hero without also being prepared to accept a monument that lampoons that same hero. Nor may a city accept a display that positively portrays Native American culture unless it is prepared to accept another that disparages that culture.

The string of *Summum* cases themselves, *see supra* pp. 21-22, illustrates that the threat of compulsory-access-for-private-monuments litigation is very real. Nor is this phenomenon exclusive to Summum. Already the notorious Rev. Fred Phelps has sought the erection of anti-homosexual monuments under the same theory. *See* Associated Press, *Minister: City must allow anti-gay monument in park* (Oct. 16, 2003), www.firstamendmentcenter.org/news.aspd?id=12082 (Phelps pressed Casper, Wyoming, to accept and display anti-Matthew Shepard monument, relying upon Tenth Circuit's *Summum* decisions); John Morgan, *City dedicates historic plaza*, Jackson Hole Star Tribune (July 17, 2007), www.jacksonholestar trib.com/artcom/articles/2007/07/17/news/casper4e 32f677cbf04e358725731900 20f943.txt (noting Ten Commandments monument in Casper was removed in November 2003 after Phelps's demand but has returned as part of a "new historic monument plaza"); John Morgan, *Phelps wants anti-gay monument*, Casper Star Tribune (July 17, 2007), www.trib.com/ articles/2007/07/19/news/casper/88d8fdf4be01754872 25731b00006a13.txt (Phelps has renewed his push for anti-Shepard monument). (A sketch of the proposed Casper monument appears at http://web.archive.org web/20061207152142/www.god hatesfags.com/fliers/oct 2003/sketch_10-4-2003.pdf.)

The theory the Tenth Circuit endorsed in this case is also being pressed within the Eighth and Ninth Circuits. *See* Judy Keen, *Fight over Thou Shalts won't wilt*, USA Today (Sept. 7, 2007), www.usatoday.com/printedition/news/20070709/a_commandments09.art.htm (Red River Freethinkers in Fargo, North Dakota, want their own monument to "balance the Ten Commandments"); *Red River Freethinkers v. City of Fargo*, No. 3:08-cv-00032-RRE-KKK (D.N.D. filed Apr. 18, 2008) (Freethinkers group asserting First Amendment Free Speech right to have their own competing monument erected in same Civic Center Mall where a donated Ten Commandments monument sits). *See also* Associated Press, *Boise: No anti-gay monument*, Spokesman-Review (Dec. 9, 2003), www.spokesmanreview.com/pf.asp?date=120903&ID=s1452867 (Phelps proposal of anti-Shepard monument in Boise).

Indeed, the Tenth Circuit's ruling in this case has sent shockwaves nationally. The United States Army, for example, has temporarily suspended all acceptance of donated monuments:

> In this case [referencing the case at bar], the lower court ruled that, once a city accepts and permanently displays a monument donated by a private party, the city creates a public forum and is required to accept other monuments donated by private parties for permanent display. Due to the ramifications that this case may have on the Army's acceptance of the Bakers Creek Memorial or any other monument funded by private funds, the Army will await the Supreme Court's decision to assess its options.

Letter of Apr. 29, 2008, from Keith E. Eastin, Assistant Secretary, Installations and Environment, Department of the Army, to Hon. Ike Skelton, Chairman, House Committee on Armed Services, U.S. House of Representatives (explaining delay in siting proposed donated memorial). *See also* Trish Choate, *Fringe sect's lawsuit delays monument to fallen WWII soldiers* (May 7, 2008), www.scrippsnews.com/node/32986.

As the dissenters lamented below, the "panel decision forces cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them." Pet. App. 9f (Lucero, J., dissenting). *Accord* Pet. App. 10f (McConnell, J., dissenting) ("Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter").

CONCLUSION

This Court should reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, *ET AL.*,

Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the Free Speech Clause permits a city to deny a private party's request to donate a monument for display in a traditional public forum that contains other privately-donated unattended displays, based on the content or viewpoint of the message conveyed or the identity of the proposed speaker.

2. Whether a privately-donated unattended display in a traditional public forum is government speech when a private party alone originally determines the message and the government does not subsequently adopt the message.

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STATEMENT OF THE CASE

1. Respondent Summum is a § 501(c)(3) tax-exempt religious organization, founded in 1975 and headquartered in Salt Lake City, Utah. JA 13; About Summum, http://www.summum.us/about/ (visited Aug. 15, 2008). "Summum" is derived from Latin and refers to the "sum total of all creation." *See id.* The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which "modifies human perceptions, and transfigures the individual." *See* The Teachings of Summum are the Teachings of Gnostic Christianity, http://www.summum.us/philosophy/gnosticism.shtml (visited Aug. 15, 2008).

Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai. *Cf. Van Orden v. Perry*, 545 U.S. 677, 717 (2005) (Stevens, J., dissenting) (noting "many distinctive versions of the Decalogue, ascribed to by different religions"). Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments. *See* The Aphorisms of Summum and the Ten Commandments,

http://www.summum.us/philosophy/tencommandments.shtml (visited Aug. 15, 2008).[1]

2. Petitioner Pleasant Grove City (the "City") is a municipality in Utah County, Utah, that is home to a city park known as Pioneer Park. Pet. 4; JA 98-99. Operated under the direction of the City's Leisure Services division, JA 137, Pioneer Park, like all public parks, is a "quintessential public forum": the type of government property that has "immemorially been held in trust for the use of the public, and, time out of mind, [used] for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Pet. App. 10a (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

In addition to park benches, trees, and a rose garden, Pioneer Park contains a number of unattended displays. Several are historical artifacts, including a replica log cabin from 1930, a mill stone used in the first flour mill in Pleasant Grove, and the original Pleasant Grove Town Hall. JA 99-102. Other displays are not artifacts, and have no obvious direct connection to the history of Pleasant Grove. Among those displays, for instance, is a "September 11 Monument" created by a local Eagle Scout, with a

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[1] In more common Exodus accounts, by contrast, the first tablets are generally referred to as the Ten Commandments, and the second set is actually described in the Bible as the Ten Commandments. *See, e.g.*, Steven Goldberg, *Bleached Faith: The Tragic Cost When Religion Is Forced Into The Public Square* 9-12 (2008).

picture of firefighters at the World Trade Center site in New York. JA 101.[2]

At least some of the displays in Pioneer Park were created solely by private parties to advance their own communicative objectives, with the government playing no role other than to permit placement in the Park. Most important here is a Ten Commandments monument designed by the Fraternal Order of the Eagles, a private civic group, and donated to the City in 1971, just two years after the Eagles established a local chapter. Pet. App. 2a. This Court already is familiar with the Eagles' distribution to various state and local governments of "over a hundred largely identical monoliths" intended to convey a "code of conduct or standards" to young people. *See Van Orden*, 545 U.S. at 713-14 (Stevens, J., dissenting); *see also id.* at 701 (Breyer, J., concurring). The monument in question here is a part of the Eagles' effort, national in scope, to disseminate a message they hoped would combat juvenile delinquency and "inspire the youth." *See id.* at 714 (Stevens, J., dissenting); *cf. id.* at 712-13 ("When the Ten Commandments monument was donated to the State of Texas in 1961, it was not for the purpose of commemorating a noteworthy event in Texas history ... or even denoting the religious beliefs of Texans at that time.").

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[2] Other similar displays include a "Gingko Tree and Plaque" honoring a City Parks and Recreation Director; a "Wishing Well" donated by the Lions Club; and a "Rocky Mountain Maple Tree and Plaque" donated by the Pleasant Grove Youth City Court/Council and 4-H. *Id.* at 100-02.

The Eagles' monument in Pioneer Park contains not only an inscription of one particular version of the Ten Commandments but also (among other embellishments) an eagle with an American flag – the emblem of the Order of the Eagles – and a prominent statement that the display was presented by the Eagles to the City. JA 16; *Anderson v. Salt Lake City Corp.*, 348 F. Supp. 1170, 1172 (D. Utah 1972), *rev'd*, 475 F.2d 29 (10th Cir. 1973).[3] Since donating their monument, the Eagles have remained committed to dissemination of their message, maintaining the monument and taking steps to ensure that their inscription remains visible. *See* JA 144, 158.

3. On September 5, 2003, Summum requested permission to erect a monument in Pioneer Park containing its Seven Aphorisms. In its letter to the City, Summum explained that the proposed monument would be "similar in size and nature" to the Eagles' Ten Commandments monument, and offered to "pay for the cost of creating ... and erecting" the monument and to abide by "the same conditions, rules, etc. under which the Eagles' monument was and is permitted and maintained."[4] JA 57-59.

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[3] The Eagles also included on their monument the "All Seeing Eye of God," a Star of David, and the Chi-Rho, symbolizing the first Greek letters of Christ's name. *See id.*

[4] The Seven Aphorisms are customarily identified as "Psychokinesis," "Correspondence," "Vibration," "Opposition," "Rhythm," "Cause and Effect," and "Gender." *See* Seven Summum Principles, http://www.summum.us/philosophy/principles.shtml (visited Aug. 15, 2008) (explaining Aphorisms). A depiction of the proposed monument can be viewed at http://www.summum.us/summum.shtml (visited Aug. 15, 2008).

The City denied Summum's request by letter dated November 19, 2003. The letter relied on a purported City "practice," "established over many decades," limiting "structures, displays, monuments, etc." to those that "meet either or both" of two criteria: they "(1) directly relate to the history of Pleasant Grove, or (2) [are] donated by groups with long-standing ties to the Pleasant Grove community." JA 61-62. The City rejected Summum's proposed display because it did not "meet either of [those] criteria." JA 62.

4. The alleged venerable "practice" cited in the City's letter did not refer to any official or formal policy, as no such policy existed when the City denied Summum's request. Indeed, there is no evidence that the City had ever before rejected such a request. Instead, the prior "practice" of placing objects and displays in Pioneer Park appears to have been an informal one established and driven by a private party, the local Historical Commission. *See* JA 153 (deposition of Mayor Dankle) (prior to 2003, there "was just a policy set up by the Historical Society, by the – those in Pleasant Grove who wanted to preserve anything historical"). As the Tenth Circuit summarized, "the record contains little support for a well-established policy or practice of approving monuments that promote the city's pioneer history." Pet. App. 20a n.9.

In August 2004, the City for the first time adopted a written policy governing the placement of any "plaque, structure, display, permanent sign, or monument" on public property. Pet. App. 2h. The City's new policy "purportedly codifl[ied] its unwritten policy," *id.* at 20a n.9, and like the November

2003 letter, it listed both historical relevance and donor ties to the community as criteria for approval of displays.

But while the November 2003 letter plainly allowed for displays when "either or both" of those criteria were met, JA 62, the written policy is unclear as to the relationship between the two criteria. In its brief, the City reads the policy (like the November letter) as making either criterion a sufficient ground for approval, Petr. Br. 6-7 – so that, for instance, a display of no historical relevance would nevertheless qualify if its donor enjoyed sufficiently long-standing ties to the community. In fact, however, the written policy's first "criteri[on] for placement" states that an item "*must* directly relate to the history of Pleasant Grove" and there is no "or" separating that command from the additional donor-related criteria, Pet. App. 2h-3h (emphasis added) – suggesting that the new policy makes historical relevance a necessary condition for display in all cases. *Cf.* JA 25 (City's Amended Answer) (referring only to historical relevance in describing policy); JA 37 (Mayor Danklef's Amended Answer) (same). Or it may be that every display must now meet *both* the historical relevance *and* donor identity criteria. *See* Br. of American Jewish Committee, et. al., as *Amici Curiae* in Support of Neither Party ("AJC Br.") at 32-33 & n.19.

The written policy also fails to clarify or even to mention the continuing role of the Historical Commission in approving displays for Pioneer Park. On its face, the policy purports to vest all decision-making authority with the City's Director of Leisure and the City Council, and directs applications for displays to the City. Pet. App. 2h. But the City Ad-

ministrator has explained that prospective donees actually must "go through" the Historical Commission, JA 190-91, a purely private organization, JA 139.[5] If Historical Commission members conclude that a proposed display "doesn't fall into the criteria," then "typically they ... would not" "forward the request on" to the City Council. JA 191; *see also* Petr. Br. 4. In other words, a display may be rejected unilaterally by the private Commission, when it fails to "forward the request on"; and the City Council generally can approve only those displays that already have met with the private Commission's favor.

5. In May 2005, after the new policy was formalized, Summum submitted another proposal, to which the City failed to respond. Pet. App. 3a. Construing the lack of response as another denial, Summum filed suit in federal district court in Utah. *Id.* Summum claimed that the City violated its free speech rights under the federal Constitution, as well as its rights under the free expression and establishment provisions of the Utah Constitution, when it allowed other expressive displays in Pioneer Park but denied Summum's request to display the Seven Aphorisms. JA 18-20. Summum sought declaratory and injunctive relief and monetary damages, and moved for a preliminary injunction requiring the City to allow

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[5] During this litigation, officials have referred, seemingly interchangeably, to both a "Historical Society," *see, e.g.*, JA 139, and a "Historical Commission," *see, e.g.*, JA 190-91. Both labels appear to refer to the same group, headed by Mildred Sutch, *see id.*; and both clearly refer to a private organization, *see id.*

display of the Aphorisms. The district court denied Summum's motion for a preliminary injunction.

The United States Court of Appeals for the Tenth Circuit reversed, holding that Summum had demonstrated a likelihood of success on the merits of its First Amendment claim and that the district court had erred in denying Summum a preliminary injunction. Pet. App. 20a, 23a.

The court of appeals began by invoking this Court's "forum analysis," recognizing that the nature of the relevant forum is "crucial" because it determines the extent to which the government may regulate private speech. Pet. App. 8a-9a. Relying on *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), the court concluded that Pioneer Park is "a traditional public forum," and, consequently, that any content- or speaker-based restrictions are "presumptively invalid." Pet. App. 10a, 12a-13a, 14a n.6. The court distinguished this case from those involving public property that does not constitute a traditional public forum (such as the grounds of municipal buildings), where the government has more leeway to regulate speech. *Id.* at 11a-12a. But in the public "streets and parks," the court determined, the government is held to strict scrutiny, and content- and speaker-based distinctions are forbidden unless narrowly tailored to advance compelling state interests. *Id.* at 10a (quoting *Perry*, 460 U.S. at 45), 12a-13a.

Because the City conceded that its exclusion of the Seven Aphorisms from a public park was content- (as well as speaker-) based, the Tenth Circuit went on to consider whether it could survive strict-

scrutiny review. Pet. App. 14a. The court concluded that the only interest asserted by Pleasant Grove – promoting its history – was not sufficiently compelling to justify content-based speech discrimination in a traditional public forum. *Id.* at 15a-16a. But the court also questioned the fit between the City's purported interest and its actual practice. Finding that the "record contains little support for a well-established policy or practice of approving monuments that promote the city's pioneer history," the court expressly recognized the possibility that the City's 2004 written policy "is a post hoc façade for content-based discrimination." *Id.* at 20a n.9.

6. The Tenth Circuit denied rehearing en banc by an equally divided vote. Pet. App. 2f.[6] Three judges dissented from the denial. Judge McConnell, joined by Judge Gorsuch, argued that the Ten Commandments monument was government speech, primarily on the ground that the City owned and controlled it. *Id.* at 14f. It followed, Judge McConnell explained, that display of the Ten Commandments was not subject to the standard First Amendment bar on content- and viewpoint-discrimination: "Viewpoint- and sometimes content-neutrality are required when the government regulates speech in public forums, but the government's 'own speech ... is controlled by different principles.'" *Id.* at 15f (citation omitted).

Judge Lucero also dissented from the denial of rehearing. Unlike Judge McConnell, he believed that the Eagles monument constituted private, not

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[6] The petition for rehearing was consolidated with a separate petition pending in *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir. 2007).

government, speech. Pet. App. 3f. But he disagreed with the panel's forum analysis, concluding that the relevant forum was a "limited public forum" in which the City could make "reasonable content-based, but viewpoint-neutral, decisions." *Id.* at 8f. Because of "indications that the cit[y] engaged in impermissible viewpoint discrimination by denying Summum access," Judge Lucero supported further briefing and argument on that factual question. *Id.* at 9f.

Responding to the dissents, Judge Tacha emphasized that there was nothing draconian about the panel decision: The court did not "suggest that, when cities display permanent private speech on public property, they necessarily open the floodgates to any and all private speech in a comparable medium." Pet. App. 18f. Even in a traditional public forum, the government remains free to impose content-neutral time, place and manner restrictions, including a ban on all private unattended displays. *Id.* at 19f. The one thing the government may not do is what the City did here: having "already permitted the permanent display of a private message ... exclude other private speech on the basis of content, that is ... *discriminate* among private speakers in a public forum." *Id.* at 20f n.1.

Judge Tacha rejected Judge McConnell's suggestion that the government speaks "just because it owns the physical object that conveys the speech." Pet. App. 21f-22f. Under this Court's precedent, Judge Tacha explained, the hallmark of government speech is not ownership of the mode of expression, but control over the speech's content. *Id.* at 20f. Accordingly, "government acceptance of the physical *medium* of speech, [but] not the message," is insuffi-

cient to turn a privately-created monument into government speech. *Id.* at 20f. The contrary approach endorsed by Judge McConnell and the City, Judge Tacha warned, would effectively immunize government discrimination against private speech from First Amendment regulation, by labeling selective government acceptance of private displays a form of "government speech." *Id.* at 26f; *see also id. at* 22f-23f.

SUMMARY OF ARGUMENT

I. The most basic of First Amendment rules is that in a traditional public forum like a public park, a city may not discriminate among speakers based on the content of their speech or the identity of the speaker. Certainly, the City could not use its "historical relevance" or donor-related criteria to allow the Eagles access to a park "speakers' corner" to proclaim their understanding of the commandments handed down to Moses, while prohibiting Summum from speaking about its own version of those commandments. As *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), makes clear, the same principle applies to the unattended displays at issue here; whatever form private communication takes, content- and speaker-based discrimination are prohibited in a traditional public forum. The City has conceded that the criteria it purportedly used to deny Summum equal access to its park are content- and speaker-based, and that is enough to decide this case.

The City's concession, however, does not tell the whole story. As the Court of Appeals suggested, even the preliminary-injunction record makes clear

that the City's alleged "policy" of approving displays based on historical relevance is a "post hoc façade" for a singular bias against Summum and its message. The City has never denied a single other request to donate a display; only Summum has been barred from the park. And neither the City's earlier informal "practice" nor its current written "policy" can actually explain why that should be so. If the Eagles' Ten Commandments monument is "directly related to the history of Pleasant Grove" because it evokes "religious freedom," as the City awkwardly suggests, then Summum's monument – at least as evocative of the same freedoms – also warrants display.

The City officially approved the Eagles' version of the Mosaic tablets while disapproving Summum's alternative account of the same subject. In fact, the record shows a targeted anti-Summum gerrymander, aimed at suppressing one particularly disfavored religious view. The City has thus transgressed the most fundamental First Amendment boundaries, taking sides in a theological debate by granting preferential access to a traditional public forum.

The City attempts to avoid this result by arguing that the forum in question is not its city park, but rather the particular mode of proposed communication, or *monuments* in the park. That claim is foreclosed by *Pinette*, holding unconstitutional a content-based exclusion of an unattended display from a city square. The Court in *Pinette* did not treat the relevant forum as "unattended displays in the square," as the City would have it; instead, it confirmed that the forum in question remained the real property of the square, and that the square remained a tradi-

tional public forum even as to non-traditional modes of speech like unattended displays. The Court recognized that the government might, as a permissible time, place and manner restriction, ban private unattended displays from its traditional public forums altogether. What it may not do is what the City did here: Award selective access to a particular mode of communication on the basis of content or viewpoint.

II. Contrary to the City's newly-discovered argument, the Eagles' monument is not "government speech" in which the City may engage free from First Amendment constraints. Under this Court's precedent, the defining characteristic of government speech is government control of the message conveyed. That standard is not met here. The City did not control the content of the Ten Commandments monument when it was created; the Eagles did. Nor did the City adopt the message of the Eagles' monument as its own after the donation, through formal resolution or otherwise making clear that the message reflects the government's own views.

Most monuments in traditional public forums do constitute government speech, either because the government actively participates in crafting the message at the front end or because it adopts the message as its own at the back. But where, as here, the government has done neither, it cannot be exempted from First Amendment regulation. To hold otherwise would allow the government to speak without the democratic accountability that justifies the government speech doctrine.

This Court has never suggested that government ownership of a display can substitute for control of

its content. If ownership alone were sufficient to show government speech, then the government could shield itself from the prohibition on content- and viewpoint-discrimination simply by taking title to expressive items before granting preferential access to a forum. Nor has the Court suggested that there is any meaningful difference, for government speech purposes, between so-called "permanent" and non-permanent displays. To the extent that permanent displays raise distinct aesthetic or space-allocation concerns, those issues can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays. But permanence alone does not justify content- or viewpoint-based discrimination among displays.

Finally, the City cannot save its discrimination against Summum's proposed speech by invoking cases in which the government "speaks" by exercising editorial discretion in selecting and compiling private speech it wishes to present to the public. The very essence of the First Amendment is that the government may *not* "edit" private speech for content in a traditional public forum. Cases recognizing a role for the government as speech "editor" are the exception, not the rule, and arise only when the government performs a function that traditionally and by its very nature requires the exercise of discretion and selectivity. Administration of expressive displays in a public park falls well outside that narrow category: Long tradition prohibits, rather than recognizes, a role for governmental editorial discretion, and content-neutral time, place and manner restric-

tions are all that is needed for the government to perform its function.

III. Application of these well-established First Amendment principles will not lead to the parade of horribles posited by the City because most monuments do constitute government speech, exempt from content- and viewpoint-neutrality obligations. The government is typically involved in commissioning and designing the displays, effectively controlling their content; and even when it is not, it still retains the option of adopting that content after the fact. Thus, the government remains free to express its views in the form of an unattended display without allowing room for competing views. All that is required is that the government take responsibility for its own message.

ARGUMENT

I. PETITIONERS VIOLATED THE FREE SPEECH CLAUSE BY EXCLUDING SUMMUM'S SPEECH FROM A TRADITIONAL PUBLIC FORUM OPEN TO OTHER PRIVATE UNATTENDED DISPLAYS.

The Tenth Circuit correctly held that the Free Speech Clause prohibits the City from denying Summum the same access to Pioneer Park afforded the Eagles and other private groups and citizens. The record in this case reveals not only the City's acknowledged content- and speaker-based discrimination but also the most "egregious" of First Amendment violations, viewpoint discrimination, *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 827 (1995), all in a "quintes-

sential" public forum: a public park, *Perry*, 460 U.S. at 45. As the Tenth Circuit recognized, that adds up to a very "substantial likelihood" that respondent will prevail on its claim, making the interlocutory relief ordered by the court entirely appropriate.

A. The City Impermissibly Denied Summum Access To Pioneer Park Based On Its Proposed Message.

Summum, like so many speakers before it, sought access to a local park in order to share its deeply-held beliefs with the local citizenry. Through an unattended display, Summum, like the Eagles, hoped to "serve the public good[,] and make the world a better place." JA 57-58 (original Summum request). The First Amendment principles that govern the access of private speakers to public parks – the quintessential traditional public forum – are well-established, and the City plainly contravened them here.

1. The category of "traditional public forum" is limited to its "historic confines," *United States v. American Library Ass'n*, 539 U.S. 194, 205-06 (2003) (plurality opinion) ("*ALA*"), and this Court has been reluctant to extend it beyond the public "streets and parks" expressly identified by *Perry*, 460 U.S. at 45. *See, e.g., Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (public airport terminal is not traditional public forum). But just as the confines of the traditional public forum are strictly limited, so, too, the "rights of the State to limit expressive activity" in such a forum are "sharply circumscribed." *Perry*, 460 U.S. at 45. Government regulation of speech in a traditional public forum is, across the

board, subject "to the highest scrutiny." *Krishna Consciousness*, 505 U.S. at 678 (internal quotation marks omitted).

First, "[i]t is axiomatic that the government may not regulate speech [in a traditional public forum] based on its substantive content...." *Rosenberger*, 515 U.S. at 828. "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its ... subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1965). Accordingly, any content-based speech restriction in a public forum is "presumptively invalid," and can survive only if it satisfies strict scrutiny, meaning that it is "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end." Pet. App. 12a-13a; *Perry*, 460 U.S. at 45. The same strict scrutiny governs speaker-based distinctions in a traditional public forum, which also "contradict basic First Amendment principles." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000); *see also, e.g.*, *Mosley*, 408 U.S. at 96; Pet. App. 14a n.6.

Second, in a traditional public forum (as in any forum), the government is flatly prohibited from regulating speech based on its "specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829. Such viewpoint discrimination is an especially "egregious form" of content discrimination: "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.*

At the same time, even in traditional public forums like parks and streets, the government may impose narrowly tailored and content-neutral time, place and manner restrictions. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding content-neutral restrictions on sound-amplification in public park). In some cases, those restrictions may take the form of a total ban on a particular mode of communication, so long as the ban is content- and viewpoint-neutral. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). Thus, a city may ban all sound trucks from a residential public park, *Kovacs v. Cooper*, 336 U.S. 77 (1949), but it may not ban the use of sound trucks to promote certain messages while allowing others. *Cf. Saia v. New York*, 334 U.S. 558, 562 (1948) (rejecting sound-truck ordinance under which "permit may be denied because some people find the ideas annoying").

In *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), the Court held that those same well-established principles apply when a private speaker seeks access to a traditional public forum to express its views through an unattended display. At issue in *Pinette* was a Ku Klux Klan request to place a cross in a public square opened to other private organizations' unattended expressive displays. The Court concluded that the government violated the Free Speech Clause by denying the Klan access to that traditional public forum based on the religious content of its proposed display. *See id.* at 760-61, 769, 772 (plurality opinion); *id.* at 772 (O'Connor, J., concurring). The Court recognized that the government might enact a content-neutral

ban on *all* private unattended displays in the square. *See id.* at 761; *id.* at 783 (Souter, J., concurring) (agreeing with suggestion of Court and Justice Stevens that state "could ban all unattended private displays in Capitol Square"). What it could not do is regulate "expressive *content*," at least without meeting the strict-scrutiny standard. *Id.* at 761 (emphasis in original).

Thus, despite Pioneer Park's status as a traditional public forum, the City of Pleasant Grove could limit unattended displays to government displays, or it could bar all unattended displays from the Park entirely. But as the Tenth Circuit held, the City cannot, consistent with the Free Speech Clause, impose a content- or speaker-based restriction on unattended displays of private expression in Pioneer Park, unless it can demonstrate that such a restriction is narrowly tailored to further a compelling government interest.

2. The City violated this core First Amendment command when it denied Summum permission to display its Seven Aphorisms. As the court of appeals explained, the City has conceded that the formal criteria it used to disapprove Summum's proposed display were "certainly content-based" and speaker-based: "[T]he City merely restricts permanent monuments based on either the content of the monument ... or the identity of the donor." Pet. App. 14a n.5 (quoting City's Tenth Circuit brief); *see also* Defs.' Mem. in Opp'n to Pl.'s Mot. for Partial S.J. 8 ("The [Summum] group is simply not on a par with the Fraternal Order of Eagles Pleasant Grove Aerie ##3372 – not in the constitutional sense; not in common sense."). That is enough to dispose of this

case. The City did not below, Pet. App. 15a, and does not now, assert that its alleged interest in promoting local history is sufficiently "compelling" to justify content- or speaker-based restrictions in a traditional public forum. Absent a compelling interest, the First Amendment prohibits the City from denying Summum equal access to Pioneer Park because of the message Summum wishes to convey.

Indeed, as this Court explained in *Pinette*, "government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Pinette*, 515 U.S. at 760. Certainly, the city could not have allowed the Eagles to come to the park and proclaim, at a "Speaker's Corner," their view of the commandments given to Moses, while prohibiting Summum from doing the same, simply because the City believed the former better reflected the City's history. *See Southworth v. Bd. of Regents*, 307 F.3d 566, 594 (7th Cir. 2002) (First Amendment prohibits placing "historically popular viewpoints ... at an advantage compared with newer viewpoints"). Similarly, the City could not use such justifications to permit one group to distribute leaflets in the park containing the Ten Commandments, while prohibiting another from distributing leaflets with the Seven Aphorisms. The same First Amendment principle precludes the City from providing preferential access to the Eagles' unattended display. No matter what form private communication takes, the government may not take sides in a theological debate by granting preferential access to a traditional public forum.

Taking the City at its word, it allowed the Eagles to display its version of Moses' tablets in the park because it deemed the message of that unattended display to "merit acknowledgment," while it prevented Summum from displaying its Seven Aphorisms – an alternative depiction of the Mosaic tables – because that message was not sufficiently "worthy." Petr. Br. 27, 31. Whether the relevant subject matter is defined broadly, as "religious freedoms," JA 144, or more narrowly, as "the Exodus story," it is plain that the Eagles and Summum wish to convey two different points of view on the same subject. The City's ideological preference for the Eagles' view constitutes a core First Amendment violation.

3. In reality, however, petitioners' reliance on "historical relevance" and the 2004 policy is pure pretext, making the constitutional violation still more egregious. Although petitioners and their *amici* argue strenuously that denial of Summum's request was a routine application of regularly and neutrally-employed subject-matter and speaker-based criteria, *see* Petr. Br. 47-48; U.S. Br. 28-31, the record is almost entirely to the contrary, evidencing instead that the City's bias against Summum and its message was the motivating factor behind disapproval of the Summum display.

When the City denied Summum's request, it acted pursuant to no official policy constraining its discretion. It is undisputed that there was no formal policy at the time, and as the Tenth Circuit found, there is also scant record support for any "well-established [] practice of approving monuments" under the City's claimed criteria. Pet. App. 20a n.9. Instead, the record suggests an ad hoc system under

which the Historical Commission, a private party, was given discretion to determine access to Pioneer Park. *See supra* p. 5. There is no evidence of denial of any proposed display before 2003, JA 156, likely because there was no City screening process until the City was compelled to invent one in order to justify its denial of Summum's request. Though it is of course true, as the United States argues, that government officials generally are "presumed to have acted in good faith," U.S. Br. 30, this Court has recognized that in the First Amendment context, unbridled government discretion over access to a forum presents an unacceptable risk of censorship and viewpoint discrimination. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

The City's 2004 written policy does not cure the problem. First, the timing and surrounding circumstances raise a serious question, recognized by the court below, as to whether the 2004 policy is a "post hoc façade" for discrimination. Pet. App. 20a n.9. The "government may not 'create' a policy to implement its newly-discovered desire to suppress a particular message." *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1153 (7th Cir. 1995). And even today, the policy provides no clear guidance to constrain official discretion. It remains impossible to say with certainty whether a proposed display must meet either, one or both of the historical relevance and donor identity criteria listed in the policy. *See supra* p. 6. Moreover, the City insists that none of the criteria is sufficient to merit display, and that it "retains [an] absolute veto power" that may be exer-

cised for unstated reasons. *See* Petr. Br. 31; Reply to Br. in Opp'n 3-4. The result is that the City is left with virtually "limitless discretion" in deciding how to apply the policy to proposed displays. *Cf. Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951) (condemning "amorphous 'practice'" and "limitless discretion" in awarding park permits).

And in fact, neither the City's claimed pre-2004 "practice" nor its 2004 policy can actually explain why the Eagles' Ten Commandments monument is a permitted display while Summum's proposed monument is not. Petitioners have been unable even to offer a consistent explanation of why the Eagles' monument meets the City's purported criteria, arguing at some points that the monument is not historically relevant but permissible on donor-related grounds, *see* JA 188 ("Ten Commandments plot ... doesn't relate to the history, it relates to a service organization"), and at others that the Ten Commandments are, in fact, "directly related" to Pleasant Grove's history, *see* JA 144 ("Ten Commandments are part of [Pleasant Grove's] Mormon heritage because .:. religious freedoms, that's why the pioneers came west").

The only thing those explanations share is that neither is plausible. When the Eagles donated their display in 1971, they were not an "established Pleasant Grove civic organization with strong ties to the community," Pet. App. 3h; their local chapter was just two years old. Nor is there any credible basis for the assertion that the Eagles' monument would "remind citizens of their pioneer heritage" while the Summum monument would not. Petr. Br. 30 (quoting Mayor Cook). The Commandments on the Ea-

gles' monument are not why Pleasant Grove's "pioneers came west." JA 144. Indeed, the Eagles' monument does not even contain the same version of the Commandments that the Mormons observe.[7] And to the extent the Eagles' display merits placement in Pioneer Park because it evokes "religious freedom," JA 144, then Summum's display – at least as evocative, if not a more potent example, of that same freedom – merits placement, as well. Even the United States appears to recognize the awkward fact that the Eagles' monument is not actually eligible for display under the City's own purported criteria. *See* U.S. Br. 31 (suggesting that City made a "mistake" in permitting the Eagles' monument).

Other displays in the park fare no better. Though the tragic events of September 11th devastated citizens across the nation, for instance, the City has offered no plausible account of how the September 11th memorial in Pioneer Park "directly relate[s] to the history of *Pleasant Grove*." Pet. App.

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[7] *See* Ten Commandments, Additional Information, http://www.lds.org/ldsorg/v/index.jsp?vgnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD&locale=0&index=20&sourceId=54a0f73c28d98010VgnVCM1000004d82620a____ (visited Aug. 15, 2008); Br. Amici Curiae The American Jewish Congress, et al., in Supp. of Petr., Van Orden v. Perry, 545 U.S. 677 (2005) (No. 03-1500), 21-22 & App. A (setting forth various versions of the Ten Commandments and describing significant theological differences associated with different treatment of graven images).; Br. *Amici Curiae* The American Jewish Congress, *et al.*, in Supp. of Petr., *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500), App. A (setting forth various versions of the Ten Commandments); *see also id.* at 21-22 (describing significant theological differences associated with different treatment of graven images).

2h (emphasis added). The best it can do is the transparently pretextual suggestion that the monument "directly relates to the history of Pleasant Grove" because firemen lost their lives on September 11th and there are firemen in Pleasant Grove, as well as a historical firehouse in Pioneer Park. JA 140. The City is of course free to honor those who sacrificed their lives to save others on September 11th. *See infra* pp. 33-34. But it may not, in a traditional public forum, privilege a private viewpoint about September 11th over Summum's views by hiding behind facially inapplicable "historical relevance" criteria.

The only plausible explanation is that both the City's 2004 policy and its actual practice were designed specifically to exclude Summum's Aphorisms from Pioneer Park while including all other displays, regardless of their actual fit with the City's ostensible criteria. *See* Pet. App. 19a-20a n.9 (questioning whether policy is "post hoc facade"); *id.* at 9f (Lucero, J., dissenting) (acknowledging "indications that the [City] engaged in impermissible viewpoint discrimination"); *see also* AJC Brief at 33 (describing policy's "all-too-convenient exclusion of Summum and questionable applicability to other monuments"); *supra* p. 3 & n.2 (identifying other displays allowed by the City). That kind of speech gerrymander, "aim[ed] at the suppression of dangerous ideas," has no place in a traditional public forum, nor, indeed, in any context in which the government regulates private speech. *See Regan v. Taxation With Representation*

of Wash., 461 U.S. 540, 548 (1983) (internal quotation marks and citation omitted).[8]

B. The Relevant Forum Is Pioneer Park, Not A Particular Mode Of Expression Within The Park.

Facing, at a minimum, acknowledged content- and speaker-based discrimination impermissible in a traditional public forum, petitioners and their *amici* take aim at the Tenth Circuit's initial identification of the relevant forum. *See* Petr. Br. 41. According to the City, the forum at issue is not its public park, undisputedly a traditional public forum. *See United States v. Grace*, 461 U.S. 171, 177 (1983) ("public places historically associated with ... expressive activities, such as ... parks, are considered, without more, to be public forums"). Instead, the forum is the specific mode of communication contemplated by Summum: monuments in the park, *see* U.S. Br. 24-25; or, in the City's refinement, government-approved monuments in the park, Petr. Br. 41. *See*

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[8] Because the forum at issue here is a traditional public forum, the City's acknowledged content-based discrimination by itself renders its denial of Summum's request presumptively invalid. But even assuming, *arguendo*, that the relevant forum were a designated or limited public forum, or a nonpublic forum, *see* U.S. Br. 22, Petr. Br. 45-48, the City's bias against Summum's distinct message would violate the First Amendment; that kind of viewpoint suppression is impermissible whatever the nature of the forum. *See, e.g., Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007). Indeed, even when forum principles do not apply, the government still may not "discriminate invidiously" in regulating private speech in an effort to suppress a disfavored view. *Regan*, 461 U.S. at 548; *infra* pp. 52-53.

also Pet. App. 5f (Lucero, J., dissenting) (nature of forum turns on "method of communication" as well as location).

That argument is foreclosed by *Pinette*. In *Pinette*, the Court considered the same mode of communication at issue here – unattended private displays – and the government's authority to regulate that communication on the basis of content in a public square. On the City's understanding, the relevant forum would be unattended displays in a public square, and because there is no historic right to erect such displays, there would be no traditional public forum barring content-based speech restrictions. But that is not how the Court decided *Pinette*. On the contrary, the Court determined that (1) the relevant forum was the real property of the city square, and (2) despite the non-traditional mode of speech in question, the square remained a traditional public forum. *See* 515 U.S. at 769. In other words, the Court recognized that "a traditional public forum retains its status as a public forum no matter what type of speech is involved." *Comite Pro-Celebracion v. Claypool*, 863 F. Supp. 682, 688 (N.D. Ill. 1994) (considering denial of permit to place monument in public park).[9]

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[9] The United States attempts to avoid the plain import of *Pinette* by arguing that the Court there "did not revisit the lower courts' conclusion that the property in question was a traditional public forum with respect to the unattended displays." U.S. Br. 25 n.14. But the plurality in *Pinette* specifically determined for itself that "Capitol Square is a genuinely public forum," 515 U.S. at 766, and Justice O'Connor's opinion likewise turned on whether "truly private speech [had been] allowed on equal terms in a vigorous public forum," *id.* at 775

Pinette is only the latest in a long line of cases applying the well-established rules governing traditional public forums to non-traditional modes of speech in such forums. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), for instance, the issue was the First Amendment right of protesters to sleep in a public park. The Court did not stop to inquire, as it would under the theory of the City and the United States, whether there is a "long-standing tradition" of private parties sleeping in public parks. *Cf.* U.S. Br. 9. Instead, despite the non-traditional nature of the proposed mode of expression, the Court simply applied the same strict scrutiny it always applies in traditional public forums, insisting that denial of a permit be "justified without reference to the content of the regulated speech ... [and] narrowly tailored to serve a significant governmental interest." *Clark*, 468 U.S. at 293. Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-29 (1993), the Court invalidated a restriction on unattended commercial newsracks on public sidewalks because it was content-based, again applying the standard associated with the traditional public forum of sidewalks rather than considering the forum status of unattended newsracks on sidewalks. *See also Saia*, 334 U.S. at 562 (same analysis applied to use of sound-truck in traditional public forum). In short, as Judge Tacha ex-

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(O'Connor, J., concurring in judgment). Nor was this mere dicta. The functioning of what the Court found to be a traditional public forum was crucial to its holding that granting equal access to the Klan's unattended cross display would not violate the Establishment Clause. *Id.* at 763-74 (plurality); 775 (O'Connor, J).

plained below, "Supreme Court precedent makes clear [that] the type of speech does not, and should not, determine the nature of the forum." Pet. App. 18f-19f.

That does not mean that speakers have a free-standing right to use non-traditional modes of expression, even in traditional public forums. As the Court recognized in *Pinette*, 515 U.S. at 761, the government may bar all use of at least some non-traditional forms of communication, including the unattended private displays at issue here. But it remains subject to the bar on content discrimination in traditional public forums, and it may not award selective access to a particular mode of communication on the basis of content or viewpoint. *See R.A.V.*, 505 U.S. at 386 ("Fighting words are thus analogous to a noisy sound truck: Each is ... a mode of speech ... but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed.").

That unexceptional conclusion is not undermined by cases like *Perry* and *Cornelius*, in which the Court has "focused on the access sought by the speaker" in "ascertaining the perimeters of a forum." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985); *see* Pet. App. 5f (Lucero, J., dissenting) (citing *Perry* and *Cornelius*); U.S. Br. 24 (same). The Court has taken that approach only in cases in which speakers have sought "limited access" to *non*-traditional forums, *Cornelius*, 473 U.S. at 801, and the Court was asked to *expand* protected speech rights by holding that even where an entire

physical location was not traditionally open to speech, the government had affirmatively allowed a narrow form of access to private speakers. *See id.* ("relevant forum" was CFC campaign and attendant literature because speakers did not claim that workplace generally was public forum for private speech, but sought access only to CFC materials); *Perry*, 460 U.S. at 45 (defining forum in terms of access to internal school mail system that lacked a physical location). Those cases have no application in traditional public forums like public parks and streets, and cannot be used to justify a contraction of speech rights in such forums.

II. THE EAGLES' TEN COMMANDMENTS MONUMENT IS NOT GOVERNMENT SPEECH.

In an eleventh-hour attempt to avoid the well-established principles outlined above, the City now seeks to couch its content- and viewpoint-based discrimination as "government speech" exempt from the First Amendment.[10] Under the rubric of "govern-

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[10] Petitioner's litigation position in this case has been a moving target. At the case's inception, the City assiduously avoided characterizing the Ten Commandments monument as government speech, *see* Defs.' Mem. in Opp'n to Pl.'s Mot. for Partial Summ. J. at 10 (referring to monument as "private religious speech" fully protected under the First Amendment), perhaps in an effort to lessen its exposure under the Establishment Clause. Before the Tenth Circuit panel, the City suggested only in a footnote that the monument might properly be viewed as government speech. Br. of Appellees 16 n.3. It was not until they sought rehearing that petitioners pressed the argument the Ten Commandments monument was government speech. The only consistent element in the City's arguments has been an overriding commitment to keeping the Summum

ment speech," the City and its *amici* actually combine and conflate elements of two distinct kinds of government action: traditional government speech, in which the government crafts its own message; and government as editor of private speech, in which the government "speaks" through its exercise of editorial judgment concerning which private messages it will make available to the public. *See* Petr. Br. 32-33, U.S. Br. 15-16; AJC Br. 16-17 (describing confusion). But however the argument is formulated, it is wrong. The Eagles' Ten Commandment monument is not traditional government speech, and the City did not legitimately act as "editor" of private speech when it permitted the Eagles' and other private displays but disapproved Summum's.

A. The Eagles' Monument Is Not Government Speech Because The Government Does Not Control The Message.

Summum does not dispute that the government is entitled to speak with its own voice, and that, under the right circumstances, it may convey its chosen message free from traditional First Amendment constraints. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). But this Court's precedents make clear that the government speech doctrine applies only when the government controls the message being sent – either by actively participating in the for-

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display out of Pioneer Park. *See Cornelius*, 473 U.S. at 834 n.2, 835 (Stevens, J., dissenting) ("Government has advanced a series of different arguments for the result that it has sought during the course of this controversy," some "so plainly without merit that they actually lend support to an inference of bias").

mulation of the message or by later adopting the message as its own. Only consistent enforcement of that requirement can ensure that the government speech doctrine is confined to its legitimate purpose, promotion of the government's own messages, and not manipulated to allow for what is actually government discrimination against disfavored private speech.

1. Under this Court's precedents, the defining characteristic of government speech is government control of the message conveyed. *See* Pet. App. 22f (Tacha, J.) ("the appropriate inquiry is whether the government controls the content of the speech at issue"). In *Johanns*, for example, the Court evaluated a federal program imposing mandatory assessments against beef-related businesses to fund an advertising campaign promoting beef consumption. In holding that the program constituted government speech, the Court emphasized that the "message" of the program is "effectively controlled by the Federal Government itself." 544 U.S. at 560; *see id.* ("message set out in the beef promotions is from beginning to end the message established" by the government). Indeed, it was "[t]his degree of governmental control over the message" that distinguished *Johanns* from prior cases involving regulation of private speech. *Id.* at 561. In short, where "the government sets the overall message to be communicated," it may speak free of traditional First Amendment controls. *Id.* at 562.

Other government-speech cases similarly turn on government control of the message. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld a government program funding family-planning services

that barred doctors from providing abortion counseling. Later decisions have explained *Rust* as a government-speech case, because the government "used private speakers to transmit specific information pertaining to its own program" and to "promote a particular policy of its own." *Rosenberger*, 515 U.S. at 833. In contrast, the Court has refused to apply the government speech doctrine where there is no claim that the government is "responsible for [the] content" of the message, *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000), or there is "no programmatic message" crafted or claimed by the government, *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001).

2. The requirement of government control over the message imposes no obstacle to the government's ability to speak through unattended displays in a traditional public forum. In fact, the vast majority of such displays around the country likely qualify as government speech under that standard. In most cases, as in *Johanns* and *Rust*, the government actively participates in crafting the message from the outset, through a planning or commissioning process that allows it to set and control the message conveyed. *See* Br. of *Amicus Curiae* Int'l Municipal Lawyers Ass'n in Support of Petr. ("IMLA Br.") 7 & App. D (describing "seamless partnership" that typically arises between the government and private parties in the monument proposal and planning process).

The government also may effectively take control of the expressive content of a display *after* the item has been created and presented to the government. As a number of lower courts have recognized, this

might be accomplished through formal resolutions by a governing body adopting the content of a monument, *see Summum v. City of Ogden*, 297 F.3d 995, 1006 (10th Cir. 2002) (city council resolution adopting speech as own); by the installation of signs making clear that the donated items reflect the views of the government, *see ACLU v. Schundler*, 104 F.3d 1435, 1446 (3d Cir. 1997) (display accompanied by sign stating that it was sponsored by government); *Pinette*, 515 U.S. at 769 (plurality); *id.* at 776 (concurrence); or by formal designations of objects as national monuments or memorials.[11]

But here, the City did not control the content of the Eagles' monument either before its creation or afterwards. It is beyond dispute that the City played no role in crafting the monument's content at the

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[11] A straightforward adoption as government speech of a privately-donated Ten Commandments monument, in particular, might of course raise Establishment Clause issues – especially where the government engages in denominational discrimination, as it did here. *See infra* pp. 52-53; AJC Br. 19-33. The Tenth Circuit's ruling, conversely, is exactly what is required to avoid an Establishment Clause problem: Granting equal access to a variety of private religious displays in a traditional public forum is unlikely to create any reasonable perception of government endorsement of religion. *See Pinette*, 515 U.S. at 770 (no Establishment Clause violation where religious expression is "purely private" and "occurs in a traditional ... public forum, publicly announced and open to all on equal terms"); *see id.* at 775 (O'Connor, J., concurring) (Establishment Clause violation unlikely where "truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly"); *see also Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices").

front end of the process; instead, the monument was presented to the City as a completed work. It was the Eagles, not the City, that developed a national project to use Ten Commandments monuments to disseminate a particular message of the Eagles' devising: that the code of conduct reflected in the Commandments should inspire youth to lead more productive lives. *See supra* p. 3. It was the Eagles, not the City, that added to the Ten Commandments on its monuments various embellishments associated with the Eagles, as well an express acknowledgment that the monuments were "presented" by the Eagles. *See id.*; *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring) (noting same prominent acknowledgment of Eagles, which "distances the State itself" from content of monument). And the Eagles' communicative project has continued over time, as the organization maintains its monument and ensures that its message remains visible to citizens in the park. *See supra* p. 4. In short, the message set out in the Ten Commandments monument was "from beginning to end" the message of the Eagles, and the Eagles alone. *Cf. Johanns*, 544 U.S. at 560.[12]

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[12] Indeed, the United States took that very position in *Van Orden*, relying on the same Tenth Circuit decision petitioners attack here. *See* Br. for the United States as *Amicus Curiae* Supp. Respt. at 28, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500) ("The prominent sign on the monument makes clear that respondents did not choose the script for the monument; the Fraternal Order of Eagles did. *See Summum v. City of Ogden*, 297 F.3d 995, 1004 (10th Cir. 2002) ('[T]he Eagles are properly considered the "literal speaker" of the speech contained on the Monument.')."). In short, the United States has argued that the Eagles' private control over the message on its Ten Commandments monuments precludes a finding of gov-

Nor did the City adopt the message of the Eagles' monument as its own after the display was presented. The City has never passed a resolution approving of the content of the monument, installed a sign making clear that the monument reflects the views of the City, or taken any other steps to embrace the monument's message as its own. Instead, at various points in this litigation, the City has insisted that it approved the monument for reasons having nothing to do with its content. *See supra* p. 23; JA 188 (Eagles' monument justified only under donor-related criteria). To this day, the City refuses to take responsibility for the monument's message, insisting that its so-called "government speech" consists not of the actual "message inscribed on the [Eagles'] monument," but the act of "selection and display" of that monument. Petr. Br. 32-33.

But the fact that the government retains or exercises approval authority over a display does not mean, as the City and United States suggest, that it controls the content of that display. *See* Petr. Br. 32-33; U.S. Br. 13; *see also* Pet. App. 15f (McConnell, J., dissenting) (City "embraced the message[] as [its] own" by accepting donation of monument). The content may, as here, continue to be wholly controlled by private parties; what the government controls is only whether that privately-formulated message will be displayed. Yet *that* is the same kind of control the government always exercises when it unconstitutionally suppresses or privileges private speech.

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ernment endorsement under the Establishment Clause, but does not preclude the government from claiming the speech as its own under the Free Speech Clause.

If "selection" alone were enough to show control over a privately-crafted message for purposes of the government speech doctrine, then granting preferential access to particular speakers or viewpoints in a public forum would no longer violate the First Amendment: The very act of "selecting" favored content or views for access would constitute government speech, making content- and viewpoint-neutrality rules inapplicable. A school could, for instance, "select" secular speakers for preferential access to its facilities and exclude religious speech, on the theory that it had thereby adopted the message of the secular speakers as its own and immunized itself from Free Speech Clause review. *But see, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (permitting school property to be used to express secular but not religious views constitutes prohibited discrimination among private messages). This Court has never even hinted at such a radical expansion of the government speech doctrine.

3. The broad discretion accorded the government when it conveys its own message is justified by the fact that the government is democratically accountable for that expression. *See, e.g., Southworth*, 529 U.S. at 235; *Johanns*, 544 U.S. at 563. As *Johanns* makes clear, that democratic accountability, in turn, depends on government control over the message conveyed. 544 U.S. at 563 (beef advertisements are subject to "more than adequate" "political safeguards" because "the basic message [is] prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations"). Because the City here "exercised no control

over the content of the message[]" conveyed by the Eagles' monument, it is not politically accountable for that message, and hence "political safeguards" that would justify application of the government speech doctrine are absent. *See* Pet. App. 26f (Tacha, J.).

That problem is aggravated by the fact that the City has failed to provide a publicly visible and accountable process for addressing donations of unattended displays. *See Johanns*, 544 U.S. at 563 (relying also on statutory authorization, regulatory control of process, and congressional oversight authority as political safeguards); Leslie Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. Mich. J.L. Reform 35, 57 (2002) ("legitimate and publicly visible political process" for engaging in government speech preserves political accountability). Prior to Summum's request, the City had no written policy or criteria to govern its display of unattended items in Pioneer Park, *supra* p. 5, and even today, the City lacks a stated policy that can actually explain why it has approved or disapproved various displays, *supra* pp. 6, 23-25.

The City has further blurred the lines of political accountability with a wholly unwritten policy that diverts responsibility for selection of displays in Pioneer Park at least partly to the local Historical Commission, a private entity. *See supra* pp. 6-7. As the system appears to work in practice, for instance, the City itself might disclaim all responsibility for rejection of a proposed display, which can be effectuated entirely by the private Commission. *Id.* Democratic accountability is not served by an underground process so opaque that the Mayor of Pleasant

Grove, asked about approval of a particular monument, responded that he "imagin[ed]" that "Mildred Sutch, the Historical Society would have that information." JA 139.

B. Neither Government Ownership Nor The "Permanence" Of The Display Is Sufficient To Convert Private Speech Into Government Speech.

Both the City and its *amici* rely in some measure on the fact that the Eagles' monument, like other Pioneer Park displays, is owned by the City. *See* Petr. Br. 29; U.S. Br. 14 (ownership "underscores" that display constitutes government speech); *see also* Pet. App. 14f (McConnell, J., dissenting) (relying principally on ownership to show government speech). Giving any dispositive weight to ownership cannot be reconciled with this Court's precedents, which apply the government speech doctrine only when the government has control over the message, not the medium, of speech. *See* Pet. App. 20f (Tacha, J.). Allowing First Amendment immunity to turn on the formalism of title would permit manipulation of Free Speech doctrine that would render meaningless many of this Court's decisions.

1. As explained above, this Court has made clear that the defining characteristic of government speech is government control over the message conveyed. *Johanns*, 544 U.S. at 560. Control over message will often go together with ownership of the medium; when, for instance, the government commissions and purchases a statue of its own design, it both controls the content and owns the medium. In

such a case, there is no question but that the government itself is the speaker. But when the two do not go together – when the government owns the medium but does not control the message – then, under this Court's precedents, the expression is not treated as government speech.

Other courts likewise have recognized that government ownership of an expressive item is not enough to establish government speech when the government does not also control the message conveyed. In *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610, 620-21 (4th Cir. 2002), for instance, the Fourth Circuit held that specialty license plates, though formally owned by the government, are nevertheless private speech where the government exercises "little, if any, control" over the messages displayed. *See also Perry v. McDonald*, 280 F.3d 159, 166 (2d Cir. 2001) (treating restriction on vanity plates as "government regulation [] concerning private individuals' speech on government-owned property"). Similar questions have arisen with respect to personalized bricks or tiles on government-owned property. In *Demmon v. Loudoun County Public Schools*, 342 F. Supp. 2d 474 (E.D. Va. 2004), the court treated a school walkway composed of bricks bearing messages engraved by students and families as a limited public forum for private speech, despite the fact that the school maintained ownership and control of the walkway (including the right to remove bricks), *id.* at 477, where the school did not control the content of the messages on the bricks, *id.* at 483. *See also Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 923 (10th Cir, 2002) (treat-

ing tiles painted by students at public high school not as government speech but as student "school-sponsored speech").

Were it otherwise, the government could shield itself from First Amendment content- and viewpoint-discrimination prohibitions simply by taking title to expressive items before granting them preferential access to a forum. In *Pinette*, for instance, the Court held that the state could not refuse to display a Klan cross, because of its content, when it had permitted other private unattended displays in a traditional public forum. 515 U.S. at 770. On petitioners' view, however, the state could have transformed all of the displays in its park into government speech – thus relieving itself of the obligation to remain content- and viewpoint-neutral – simply by making transfer of title a condition of access to the forum. *Cf.* Pet. App. 26f (Tacha, J.) ("To extend government speech to the context before us would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own.").

Indeed, under petitioners' theory of ownership-as-speech, several of this Court's prior cases could have been resolved differently, and on far simpler grounds. In *Rosenberger*, for instance, the university funded the printing of the student publications, and thus arguably owned the medium of expression. 515 U.S. at 823-825. Yet the Court did not think that fact transformed the publications into government speech. Instead, the Court held that the publications were not government speech because the university did not control their content. *Id.* at 834-35. Put differently, there is no reason to think *Rosenberger should* have been decided differently, and the

university freed from viewpoint-neutrality constraints, if the university had retained ownership rights to its publications. Similarly, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court evaluated a school's decision to delete two pages from the school newspaper under the "school-sponsored" speech doctrine, holding that the school's actions were related to "legitimate pedagogical concerns." *Id.* at 273. Had ownership and control of the physical medium of expression been a decisive factor, the Court could easily have determined that the school paper was government speech for that reason and ended its analysis there.

2. The fact that the ownership in this case is of a "permanent" monument does not change the analysis. The sporadic reliance of petitioners and their *amici* on a distinction between "permanent" and "nonpermanent" displays is neither correct nor helpful. *See, e.g.*, Petr. Br. 41 (relevant forum is "city's internal selection and approval process for ... permanent, unattended monuments"); U.S. Br. 2 ("no longstanding tradition of private parties erecting permanent monuments in public parks"); *but see* Petr. Br. 24 (referring only to "monuments and other forms of unattended displays").

First, the City's policy for display applies equally to nonpermanent as well as permanent objects. *See* Pet. App. 1h (governing "permanent signs" as well as "plaques, structures, [and] displays"). Second, petitioners offer no criteria for what constitutes a "permanent" monument – and there certainly is no basis for suggesting that the displays in Pioneer Park are "permanent" in the usual sense of the word, given the City's insistence that it can move or remove

them at its discretion. *See* Petr. Br. 33; JA 159; *see also* IMLA Br., App. 12a.

But even assuming the City could identify a meaningful category of "permanent" displays as to which it has applied a discrete policy, there is no reason to treat government ownership of a permanent display differently from ownership of any other display. If a private party determines the content of the message on a display, and the government does not adopt the message afterwards, it is private speech, regardless of whether the display is deemed permanent or non-permanent. This Court's cases have thus never relied on or even recognized a distinction between permanent and non-permanent displays. *See Discovery Network*, 507 U.S. at 417 (regulation of newsracks, described as "permanent, freestanding dispensing devices," subject to standard First Amendment bar on content discrimination); *see also Demmon*, 342 F. Supp. 2d at 487 (treating "permanent" engraved bricks as private speech). Nor is there any basis for extending special discretion to the government in the regulation of permanent displays. To the extent that permanent rather than nonpermanent unattended displays raise unique concerns regarding aesthetics or space allocation, *see* AJC Br. 15, this Court already has given governments the leeway to address those concerns through content-neutral time, place and manner restrictions that include the option of a ban on all unattended private displays. *See Pinette*, 515 U.S. at 761. And to the extent that the government has a distinct interest in establishing permanent displays for government messages, it is free to do that either

by controlling the design of those displays or adopting their messages afterwards.

3. Even assuming, *arguendo*, that the City's ownership of the Eagles' monument was an indicia of government speech, it would not negate the private speech elements associated with the same monument. Whether or not the City is speaking through the monument, it is clear, at a minimum, that the Eagles are: The Eagles designed and donated the monument for their own communicative purposes, and demonstrate a continuing interest in the dissemination of their own message.

Some courts have recognized the possibility that both the government and a private party may engage in speech through the same expressive item. In such cases, the courts have not allowed the presence of a government speaker to obliterate private speakers' entitlement to First Amendment protection. In *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004), for instance, Judge Michael described a state-authorized specialty license plate as a "mixture of private and government speech" in a limited public forum. Because of the private-speech element, he went on to apply the First Amendment standard that customarily governs restrictions on private speech in such a forum, prohibiting the state from engaging in viewpoint discrimination. *Id.* at 797. Similarly, in *Sons of Confederate Veterans*, Judge Luttig treated specialty license plates as government- and private-speech "hybrids," with the private speech element enough to trigger, "at a minimum," the First Amendment prohibition on viewpoint discrimination. 305 F.3d at 245, 247; *see also Robb v. Hungerbeeler*, 370 F.3d

735, 744-45 (8th Cir. 2004) (state Adopt-A-Highway program "entail[ed] some degree of private 'speech' protected by the first amendment" though the program also "involves some state speech that inheres in the signs' design").

Here, given the complete absence of any government control over content, the Eagles' monument remains purely private speech. But even if the City's ownership of the monument were enough to give it a discrete speech interest, there is still a substantial private speech component sufficient to trigger the First Amendment's standard bar on content-, speaker- or viewpoint-based discrimination in a traditional public forum.

C. The City Cannot Evade First Amendment Scrutiny By Labeling Itself An "Editor."

Unable to show that it controlled the content of the Pioneer Park displays as required by the government speech doctrine, the City invokes another line of this Court's cases: cases in which the government permissibly exercises "editorial discretion" in selecting private speech it wishes to present to the public, while rejecting private speech that it does not. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998); Petr. Br. 26-34 (citing, *inter alia*, *Forbes* (public television broadcaster); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (government arts grants); *ALA*, 539 U.S at 205-06 (public library)). In the City's view, the very fact that it engages in this form of editing of private speech – "select[ing] permanent displays, conveying the government's chosen theme, for erec-

tion on government land" – brings it within those cases and thus outside the First Amendment bars on content- and viewpoint-based discrimination. *See* Petr. Br. 26-34; *see also* U.S. Br. 15-16, 18-19.

The City has it exactly backwards. Government editing of private speech in a traditional public forum is the definition of a First Amendment violation, not a First Amendment defense. *See* AJC Br. 16-17. Nobody would argue that the government could exercise "editorial control and judgment" over the content of what private persons say on a soapbox in a public park, or what signs they carry, or what handbills they distribute, even if that "selective inclusion and exclusion of speech" is itself communicative. *Cf.* Petr. Br. 26. Nor may the government make an "ultimate editorial judgment" that Summum's display is not "worthy" of approval because it does not conform to the government's "overarching message." *Id.*

1. The Government May Not "Edit" Private Speech In A Traditional Public Forum.

Both the City and the United States begin with the premise that editorial decisions may be "act[s] of speech by the person or entity that does the selecting." U.S. Br. 16; *see* Petr. Br. 32. That is correct, and there is no question but that *private* parties may engage in such editorial "speech" protected by the First Amendment. *See* U.S. Br. 15-16 (citing cases involving private editorial speech, including *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)). But that does not answer the essential predicate question here: whether the *government* may speak in a *traditional*

public forum by "editing" private speech for content. It may not.

As discussed above, *see supra* p. 17, it is a core First Amendment principle that content-based speech restrictions in a traditional public forum are presumptively invalid. It follows that in such a forum, the government may not pick and choose among private speech to ensure conformity with an approved government message. Were it otherwise, foundational First Amendment cases would have to be revisited: The government could, for instance, "edit" private picketing on public streets so that it conformed to an official preference for labor picketing, *cf. Carey v. Brown*, 447 U.S. 455 (1980) (exception to picketing restriction for labor picketing is impermissible content-based speech restriction), or "edit" private speech at student-group meetings so as to promote an "overarching message" of secularism, *cf. Widmar*, 454 U.S. 263 (same as to exclusion of religious speech from student-group forum).

Not surprisingly, then, none of petitioners' government-as-editor decisions concerns a traditional public forum. And none turns on the government's self-justifying declaration that it is acting as "editor." Instead, each arose in a narrow context in which the government was performing a function that by tradition and by its very nature *required* the exercise of broad discretion to select amongst private speech. In *Forbes*, for example, the Court refused to apply public forum principles to a public television broadcaster's programming decisions because "broad rights of access for outside speakers would be antithetical ... to the discretion that stations and their editorial staff *must exercise* to fulfill their journalis-

tic purpose and statutory obligations." 523 U.S. at 673 (emphasis added); *id.* at 674 ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."). In its subsequent government-as-editor cases, the Court extended that reasoning to federal arts funding and library collection decisions, finding that those functions likewise require the exercise of editorial discretion. *See Finley*, 524 U.S. at 585 ("Any content-based considerations that may be taken into account in the grant-making process are *a consequence of the nature of arts funding*." (emphasis added)); *ALA*, 539 U.S. at 205 ("[F]orum analysis and heightened judicial scrutiny are incompatible with ... the discretion that public libraries *must have to fulfill their traditional missions*. Public library staffs *necessarily consider content* in making collection decisions and enjoy broad discretion in making them." (emphases added)).

Neither tradition nor necessity justifies the exercise of broad editorial discretion with respect to the administration of private expressive displays in a city park. Indeed, the traditional presumption is precisely the opposite: The government need not – indeed, generally may not – engage in content- or viewpoint-based discrimination in a traditional public forum. Nor do the physical space constraints associated with monuments and other unattended displays necessitate editing for content; as in *Pinette*, the government may address those issues through neutral time, place and manner restrictions, including a bar on all private unattended displays. And to the extent that the government wishes to convey its

own message through unattended displays it is completely free to do that, either by controlling the content of the message before it is crafted or adopting it afterwards. Extending the government-as-editor doctrine to cases like this one, in which there is no compelling necessity for the exercise of editorial discretion, would make it all too easy for the government to disguise impermissible content and viewpoint discrimination against private speech as "editing."

Nor, of course, does the mere fact that petitioners have sought to edit private speech in Pioneer Park deprive the park of its status as a traditional public forum. As the court below explained, the City "cannot close or otherwise limit a traditional public forum by fiat; a traditional public forum is defined by its objective characteristics, not by governmental intent or action." Pet. App. 11a. In *Grace*, for instance, the Court invalidated a federal law banning expressive conduct on the sidewalk in front of the Supreme Court, a traditional public forum, because "Congress ... may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums." 461 U.S. at 180 (internal quotation marks and citation omitted); *see also Forbes*, 523 U.S. at 677 (government does not "retain[] the choice of whether to designate its property as a forum for specified classes of speakers" in a traditional public forum).

2. The City Did Not Legitimately Act As An Editor Of Private Speech In Pioneer Park.

As shown above, the First Amendment forbids the City from "editing" private speech in a traditional public forum like Pioneer Park. But even if the City could act as editor, the record amply demonstrates that it did not legitimately do so here. Instead, the City's litigation-driven characterization of its conduct as "editing" is nothing more than a post hoc rationalization for its content- and viewpoint-based discrimination against the message Summum wishes to convey.

a. As the court below found, the City's conduct in this case does not resemble the exercise of government editorial discretion approved in *Forbes*, *Finley*, and *ALA*. *See* Pet. App. 13a n.4 (City was not "acting in its capacity as librarian, television broadcaster, or arts patron"). According to the City, it qualifies as a government "editor" because it engaged in "selective inclusion and exclusion of speech" to convey an "overarching message" in Pioneer Park. Petr. Br. 26. In fact, however, the preliminary injunction record is devoid of evidence that the City actually engaged in "selection" in support of a governmental message.

Put simply, the City engaged in no "selection" of any kind until it "selected out" Summum's proposed monument. There is no evidence that the City has ever, before or after the events of this case, rejected any other proposal for an unattended display in Pioneer Park. JA 156. Instead, the record strongly suggests that rather than screening donation pro-

posals or seeking out items consistent with its purported message, the city passively accepted all comers, rendering its vaunted approval authority largely nugatory. That is not the kind of necessarily discretionary "selection" process the Court approved in cases like *Finley* and *Forbes*. *See Finley*, 524 U.S. at 585 (NEA "den[ies] the majority of the grant applications that it receives"); *Forbes*, 523 U.S. at 674 (broadcasters "must often choose among speakers expressing different viewpoints").

Moreover, the City's claim that its "selection" of items for Pioneer Park was in service of an "overarching message" is so implausible that it suggests a pretextual rationale for what is in reality garden-variety content- and viewpoint-based discrimination. The City cannot even decide how to describe the "overarching message" that unites the disparate displays in Pioneer Park, variously labeling the park as a place to "portray the Mormon pioneer-era heritage of Pleasant Grove," Petr. Br. 3, a place to preserve "anything historical," *id.* (citing JA 153), and even a place for any work that will "enhance" the park, JA 179. And, significantly, under the City's own account of its policy, the Park may be home to *any* display, regardless of subject matter, so long as its donor has longstanding ties with Pleasant Grove. *Supra* pp. 6, 23. The problem with the "message" sent by, *inter alia*, a Gingko tree, a log cabin, and a Ten Commandments monument is not that it is insufficiently "particularized," *cf.* U.S. Br. 16. It is that it is either nonexistent or so diffuse that it imposes no constraints at all on the government's ability to evade standard First Amendment review by invoking "government-as-editor" status.

b. The only real message sent by the City's "selective inclusion and exclusion of speech" in Pioneer Park is that Summum's Seven Aphorisms, and only the Seven Aphorisms, are not welcome there. But that sort of discrimination against a disfavored minority viewpoint is the one form of discretion that the government may *never* exercise. In no speech forum, traditional public forum or otherwise, may the government "suppress expression merely because public officials oppose the speaker's view." *Cornelius*, 473 U.S. at 800. Even outside the speech-forum context, the government may not "discriminate invidiously ... in such a way as to aim at the suppression of dangerous ideas." *Regan*, 461 U.S. at 548 (internal quotation marks and citation omitted). *Cf. Velazquez*, 531 U.S. at 544.

Thus, even where the Court has recognized that tradition or necessity justifies the government's exercise of editorial discretion, it has been careful to denote the First Amendment limitations on that authority. In *Finley*, the Court, citing *Regan*, warned that "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case." 524 U.S. at 587. Justice Souter likewise emphasized those limits on editorial discretion in his *ALA* dissent, noting that, although the plurality had affirmed the broad editorial discretion of government librarians generally, it nonetheless "would consider to be illegitimate[] ... [decisions to] exclud[e] books because their authors are Democrats or their critiques of organized Christianity are unsympathetic." 539 U.S. at 236 (Souter, J., dissenting). *See also Bd. of Educ. v. Pico*, 457

U.S. 853, 870 (1982) (plurality) (government may not exercise its discretion over the content of school libraries "in a narrowly partisan or political manner").

Petitioners in this case clearly exceeded the bounds of any editorial discretion they may have possessed in selecting displays in Pioneer Park. The record evidence in this case is more than sufficient to show that Pleasant Grove drafted, applied, and defended its application of the 2004 policy in such a manner as to gerrymander for rejection only Summum's Seven Aphorisms. *See supra* p. 25; AJC Brief 31-33. Other than the City's distaste for Summum or its beliefs (or both), there is no way to explain why the Eagles' non-Mormon version of the Ten Commandments is a sufficient representation of Mormon pioneer history or the religious freedom that drew the Mormon pioneers west, but Summum's Aphorisms – an alternative version of the inscription on the tablets given to Moses – are not. On this point, the Free Speech and Establishment Clauses speak with one voice: The City lacks the authority to bless any one version of Moses's trips to Mount Sinai. *See Pinette*, 515 U.S. at 760 (religious speech protected under Free Speech Clause); *ALA*, 539 U.S. at 236 (Souter, J., dissenting) (government cannot edit out "critiques of ... Christianity"); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Even if it could act as editor here, the City is not permitted to "edit out" only the disfavored religious beliefs of Summum.

III. THE COURT OF APPEALS' DECISION WILL NOT LEAD TO A PARADE OF HORRIBLES.

The City and its *amici* have spilled much ink fretting about consequences that do not in fact follow from the Tenth Circuit's decision. It simply is not the case that a plague of offensive monuments will clutter public spaces throughout the country – or even the traditional public forums to which the decision below is confined – if the Tenth Circuit's decision is affirmed. That is because most monuments already constitute government speech under the principles we have described, and thus do not implicate the First Amendment's content- and viewpoint-neutrality rules. And where ambiguity remains, government officials may clarify that an existing monument constitutes government speech because it conveys a governmental message.

As explained above, the core requirement of government speech is that its content be controlled by the government. Whether a monument is actually created by government employees or by a private entity "enlist[ed]" to "convey [the government's] own message" does not matter, so long as the government effectively controls the design of the content. *Cf.* Petr. Br. 28; U.S. Br. 17 (discussing commissioned monuments). Similarly, the decision below poses no barrier to the private funding of government monuments. That a monument commissioned by the government and built to government specifications is funded by private donations does not detract from the conclusion that it is government speech. Regardless of the source of funding, the government's content control makes it government speech. *Cf.* U.S.

Br. App. 1a-11a (listing several privately funded monuments). Finally, the mere fact that a monument is privately donated, *see* Petr. Br. 50, does not make it forever private speech if the government effectively controls the content of the monument before the donation or adopts the content as its own after the fact.

It is obviously true that "[s]tatues and commemorative objects displayed ... across the country help tell the story of the Nation's history and heritage, and may convey important government messages." U.S. Br. 9. And that is precisely why the government is typically involved at the front end in purchasing, commissioning, and designing and/or approving the design of those displays, effectively controlling and taking responsibility for the content of the displays. As petitioners' *amicus* International Municipal Lawyers Association explains, "municipalities around the country exercise content control over monuments through procedures that are remarkably similar to those outlined in *Johanns*." IMLA Br. at 15; *see also id.* at 7 (describing "seamless partnership" that typically arises between government and private parties in monument planning process).

At the national level, the monuments on the National Mall, highlighted by petitioners and their *amici*, perfectly illustrate why most commemorative displays do constitute government speech. Under the Commemorative Works Act of 1986 ("CWA"), 40 U.S.C. §§ 8901-8909, an elaborate framework governs the proposal, approval, and installation of any statue, monument, or other "structure or landscape feature" in the District of Columbia. *Id.* §§ 8901-

8902. The CWA created the National Capital Memorial Advisory Commission ("NCMAC") to oversee and provide advice on issues related to commemorative works. *Id.* § 8904. Members of the NCMAC include the chairs of the National Capital Planning Commission and the Commission of Fine Arts, the latter of which advises on matters of aesthetics. All told, a 24-step collaborative process must be completed – including the passage of authorizing legislation, submission and approval of site and design proposals, and issuance of a construction permit – in order to erect a memorial in Washington, D.C. *See* Zina L. Watkins, Memorials: Creating National, State and Local Memorials (2008), http://assets.opencrs.com/rpts/RS21080_20080521.pdf (visited Aug. 15, 2008). In short, there is active, pervasive and continual governmental involvement in formulating the messages to be conveyed by these monuments – right down to the facial expression on a Martin Luther King, Jr. statue. *See* Michael E. Ruane, *Architect Requests More Changes to King Statue*, Washington Post, May 19, 2008 at B01.

Federal law also allows for designation of a work as a national monument or memorial, which demonstrates that the government intends to express the message of the work. Under the Antiquities Act of 1906, 16 U.S.C. § 431, the President may designate national monuments like, for instance, the Statue of Liberty, declared a national monument in 1924. *See* Proclamation No. 1713, 43 Stat. 1968 (Oct. 15, 1924). National memorials are authorized by acts of Congress. For example, Congress authorized establishment of the Bakers Creek memorial noted by petitioner and the United States, Petr. Br. 52-53, U.S.

Br. 20, "to commemorate" those who lost their lives in the air crash. *See* Pub. L. No. 109-163, 119 Stat. 3536 (Jan. 6, 2006). Accordingly, display of that memorial would not raise First Amendment questions. *See also* Pub. L. No. 107-226, 116 Stat. 1345 (Sept. 24, 2002) (authorizing memorial to honor passengers of Flight 93 and establishing Flight 93 Advisory Commission to oversee its construction).

To be sure, there may be cases in which a privately-donated monument comes to the government as a finished work. Even then, the government remains free to adopt the content of that monument as its own expression. *See supra* pp. 33-34. Congress may designate existing works as national memorials, as well as provide for new ones. *See* Pub. L. No. 102-41, 105 Stat. 242 (May 8, 1991) (designating preexisting astronauts memorial at the John F. Kennedy Space Center in Florida as "the national memorial to astronauts who die in the line of duty"). Alternatively, any governing body may embrace the content of a preexisting monument through a formal resolution, *see City of Ogden*, 297 F.3d at 1006, or by installing signs making clear that the content of the donated monument reflects the views of the government, *see Schundler*, 104 F.3d at 1446.[13]

In short, it is not true that under the Tenth Circuit's ruling, "a city cannot accept a monument post-

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[13] When the government designates a space as a military park to commemorate a battle, *see* U.S. Br. 1-2, App. A, that space is not a traditional public forum. In such a place, moreover, the government would have broad discretion to select monuments that it views as fulfilling that commemorative purpose. *Cf. Greer v. Spock*, 424 U.S. 828 (1976).

humously honoring a war hero without also being prepared to accept a monument that lampoons that same hero." Petr. Br. 50-51. To the contrary, the government is free to honor the war hero without also lampooning him or her so long as it does so in its own voice, controlling and taking responsibility for the message conveyed and thus subjecting itself to full political accountability.

CONCLUSION

The decision of the Tenth Circuit should be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 07-665

IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, *ET AL.*,

Petitioners,

v.

SUMMUM, a corporate sole and church,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

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ABBREVIATIONS KEY

ADF Br.	Brief of Amici Curiae, Alliance Defense Fund and Family Research Council
Casper Br.	Brief Amicus Curiae of the Cities of Casper, Wyoming; et al.
FFE Br.	Brief of the Foundation for Free Expression as Amicus Curiae
IMLA Br.	Brief of Amicus Curiae International Municipal Lawyers Association
JA	Joint Appendix
JSPAN Br.	Brief Amici Curiae of The Jewish Social Policy Action Network, et al.
NLF Br.	Brief Amicus Curiae of the National Legal Foundation
Opp.	Brief in Opposition to Certiorari
Pet.	Petition for Writ of Certiorari
Pet. App.	Appendix to the Petition for Writ of Certiorari
Pet. Br.	Brief for Petitioners
Resp. Br.	Brief for Respondents

States Br.	Brief of the Commonwealth of Virginia, Thirteen Other States and Puerto Rico as Amici Curiae
U.S. Br.	Brief for the United States as Amicus Curiae

INTRODUCTION

Under established First Amendment principles, the errors in the Tenth Circuit's judgment are stark. Respondent Summum makes little effort to defend that decision. Instead, Summum tries to defend its requested preliminary injunction by resorting to novel theories that find support neither in the record, nor in logic, nor in this Court's decisions. Notably, Summum has conceded key points of Pleasant Grove's argument.

The basic question is whether a city gets to decide which permanent, unattended monuments, if any, to install on city property. The answer is "Yes."

> At some point, the government's relationship to things under its dominion and control is virtually identical to a private owner's property interest in the same kinds of things, and in such circumstances, the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 814 n.31 (1984) (internal quotation marks and citation omitted). Governments can therefore design their own parks, including selecting and displaying monuments that best communicate the government's chosen message(s).

Summum has no persuasive argument in response. Indeed, Summum concedes that

- "the government is entitled to speak with its own voice," Resp. Br. at 31;

- when "the government controls the message being sent," the government "may convey its chosen message free from traditional First Amendment constraints," *id.*; and,
- "the government remains free to express its views in the form of an unattended display without allowing room for competing views," *id.* at 15.

Here, it is undisputed that Pleasant Grove City owns and exercises ultimate authority over each of the monuments and other objects on display in Pioneer Park. The city -- not private parties -- decides whether and where to place such objects, and indeed whether to keep or remove them. Pet. Br. at 4-5 & n.2; JA 50-51 (¶¶ 6-10) (city council controls monument placement; city has exclusive ownership of park; "specific permission and approval" of city's "governing council" given for erection of monument). None of this is surprising.

What *is* surprising is that Summum demanded, in a federal lawsuit, a First Amendment right to force the city to erect, on city property, Summum's preferred monument, the "Seven Aphorisms of Summum." JA 11-23, 57-60, 63-64. And what is even *more* surprising is that a panel of the Tenth Circuit embraced Summum's argument. Pet. App. A.

That is why this case is here, and that is why the Tenth Circuit's judgment must be reversed.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE[1]

1. To defend the mandatory preliminary injunction the Tenth Circuit ordered, Summum invokes, for the first time in this litigation, a theory that appears nowhere in the record and was never advanced below. Citing its own website, Summum describes its proposed monument as an "alternative version" of the Mosaic Ten Commandments. Resp. Br. at 53; *see id.* at 1-2. Summum thereby attempts a viewpoint discrimination claim. *Id.* at 12, 21. However, that claim is baseless. Summum cites no evidence that Summum ever explained to city officials what the Seven Aphorisms were, much less that they supposedly presented an alternative version of the Decalogue. Summum itself apparently did not even make this claim on its website until sometime between March and May of 2005, i.e., at least a year and a half *after* the city had rejected Summum's proposal. *See* http://web.archive.org/web/*/http://www.summum.us (compare results when clicking on "Mar. 03, 2005" and "May 26, 2005," each time then clicking on link for "Philosophy"). Not surprisingly, Summum failed to make this argument below and must therefore go outside the record (conveniently, to Summum's current website) to lay its factual predicate. Resp. Br. at 1-2.

Summum's new "alternative depiction" theory illustrates the importance of recognizing a government body's selection of its monument displays as *government* speech. If such displays remained the

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[1]The numbered sections herein correspond to the numbered sections in the Brief for Respondent to which they reply.

donor's private speech, government bodies would face potentially endless claims of "viewpoint discrimination." U.S. Br. at 19-20. Not only would a Ten Commandments display open a city to whatever "alternative" accounts a private party might offer, whether serious or parodic (*see, e.g.*, Mel Brooks's account, available at http://video.google.com [search for "Mel Brooks Ten Commandments"]), but countless other monuments would trigger potential liability for refusal to display "the other side." *See, e.g.*, States Br. at 8-9; Casper Br. at 15-16; ADF Br. at 8; Amer. Legion Br. at 8, 22-23; JSPAN Br. at 4; Liberty Counsel Br. at 14, 25.

2. Summum contends that several of the objects displayed in Pioneer Park do not, in its judgment, fit the historic theme of that park. Resp. Br. at 2-3. Summum quibbles about whether a "Gingko Tree and Plaque" honoring a former park official, a September 11 monument, a "wishing well," a Ten Commandments monument, or a "Rocky Mountain Maple Tree and Plaque" represent departures from the park's theme. *Id.* at 2-4 & n.2. But the city legitimately included these displays. *See, e.g.*, JA 144 (Ten Commandments reflective of motivation for Mormon pioneers' westward migration in search of religious freedom),[3] 174-75, 196 (September 11 monument placed "in conjunction with the placement of the first fire station that we had in town to remember the firemen particularly, and policemen, that were killed and lost their lives in the 9/11 attack"), 101, 176 (Gingko tree as thank-you to former parks director who served for more than 20

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[3] *See also* NLF Br. at 12-14 (noting prominent role of Ten Commandments in Mormon pioneer history).

years), 117, 177 (placement of well next to log cabin designed to illustrate pioneer era). Summum's objections amount to no more than second-guessing a city's judgment regarding which permanent fixtures to install in a park. Such a debate is not a matter of constitutional law but rather of property management.

While city parks are not constitutionally required to have themes in the first place, here, as the name of the park indicates, the city clearly has chosen a theme for Pioneer Park.[3] Summum concedes that its proposed monument does not fit into that theme. Pet. Br. at 7 & n.3. Hence, the city properly rejected that monument.

3. Summum acknowledges that it sought city approval to erect its Seven Aphorisms monument "under the same conditions, rules, etc. under which the Eagles' [Ten Commandments] monument was and is permitted and maintained over the years," JA 58 (quoted at Resp. Br. at 4). Those "conditions" included:

- a donation of the monument, JA 97, i.e., unconditional surrender of all rights, title, and interest in the display, *see also* JA 158-59;[4]

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[3]Summum errs when it claims the city played "no role other than to permit placement" of such objects. Resp. Br. at 3. In fact, the city acquired both ownership and, more importantly, control over each such display, and the erection, location, and retention of each display is solely at the direction (and discretion) of the city. Pet. Br. at 5 & n.2. Moreover, the city retains continuing authority to remove the monuments or alter the inscriptions thereon. *Id.*, Pet. App. 14f, IMLA Br. at 21.

[4]*Accord* Amer. Legion Br. App. 1 (letter from Eagles' chief counsel) ("Since the 1950's, when these donations began, each time we have donated a plaque or monument we have surrendered any ownership or control interest we may have had in it. . . . In each case, the donee retained complete ownership and

- official acceptance of the monument, JA 103, 123;
- erection of the display "with the specific permission and approval" of the city, JA 51; and,
- thenceforth, city control over the placement and retention of the monument, JA 158-59.

These "conditions" all point to *government control* over the monument and its display, making such a display *government speech*. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005) (message "effectively controlled" by government is government speech). Thus, Summum's extraordinary request was tantamount to demanding insertion of the Seven Aphorisms monument into *the city's speech*. There is no such First Amendment right. "Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001).

4. Summum erroneously states that, before the city adopted its *written* policy, Pet. App. 1h-4h, the city had *no* policy for displays and monuments. Resp. Br. at 5. This is flatly incorrect. The city had an *unwritten* policy that it had employed for decades. Pet. Br. at 3-4, 6-7; JA 61-62. The subsequent written policy basically codified the unwritten policy. Pet. Br. at 7. Moreover, it would be an odd rule that said a city has to have a detailed formal policy governing monument placement before it can decline unsolicited private offers to

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control of the plaque or monument upon acceptance and delivery. We have no legal claim to any of them")

donate unattended permanent displays. *See* IMLA Br. at 26 ("Many municipalities do not have a written policy, or an established practice, regarding the types of donated monuments they accept because this is neither a regular occurrence nor one the administration has invited"). Parks are not by default dumping grounds for private monuments.[5]

Summum claims to perceive ambiguity in the fine points of the city's internal policy governing monument acceptance and placement. Resp. Br. at 6-7. This is an irrelevant sidelight, for *Summum has already conceded that its proposed display does not meet the city's criteria*. Pet. Br. at 7 & n.3.[6]

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[5]Summum erroneously describes the city's Historical Commission as "a private party." Resp. Br. at 5. In fact, the city created the Historic Preservation Commission as a governmental commission in 1984 (Ord. 1984-11). Members are appointed by the mayor. Pleasant Grove Ord. 2002-5, adopted 2-5-2002, codified at § 2-2C-2. *See also id.* § 2-2C-3(C)(1) (duties of commission include "an advisory role to other officials and departments of government regarding the identification and protection of local historic and archaeological resources"). (Current Pleasant Grove City ordinances are available at http://66.113.195.234/UT/Pleasant%20Grove/index.htm.) The nature of the commission is by no means crucial, however, as government bodies are free to receive advice and recommendations from private entities (such as a bar association or the National Trust for Historic Preservation) as well as from government commissions.

[6]Summum faults the city for not arguing in the district court or before the Tenth Circuit panel that the placement and display of monuments in its park counts as government speech. Resp. Br. at 30 & n.10. The city rebutted this argument previously. *See* Reply to Opp. at 4-5.

ARGUMENT

The Tenth Circuit has gone badly astray.

"It would be startling if the First Amendment were construed to compel the government to accept title to property it does not want, or to accept the permanent storage on its land of such a monument or other fixture." U.S. Br. at 14. Yet in its line of *Summum* cases[7] -- all four cases brought by the same party, respondent here -- the Tenth Circuit has embraced precisely that "startling" rule, holding that when a government body accepts and displays a monument donated by a private party, the First Amendment requires that government body, absent a compelling interest, to accept and display additional monuments (such as Summum's "Seven Aphorisms") on demand. As petitioners, the United States, numerous states, representatives of municipalities, and multiple other supporting amici before this Court agree, this decision should be reversed.

The Tenth Circuit's imposition of public forum analysis and strict scrutiny upon a government body's monument selection process ignores the reality that it is the *government* that speaks through its selection and display of monuments. *Cf.* IMLA Br. at 11 ("monuments are a form of public art"). As *government*

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[7] *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Summum v. Duchesne City*, 482 F.3d 1263 (10th Cir.), *reh'g denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-690 (U.S. Nov. 21, 2007); *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir.), *reh'g denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008) (No. 07-665).

speech, this "editorial discretion" in park management does not trigger the First Amendment limits that apply to restrictions on *private* speech. Pet. Br. § I; U.S. Br. at 11-22; States Br. at 1-2.

Summum embraces an extreme position. Summum posits that the mere fact that a city park "contains other privately-donated unattended displays" prevents a city from denying, based on the identity of either the donor or the donation, any other private party's "request to donate a monument for display," Resp. Br. at i (Summum's rewrite of Question 1). Summum likewise maintains that "a privately-donated unattended display" in a city park remains private speech, not government speech, despite government ownership and control, whenever the monument was donated as a finished product ("a private party alone originally determines the message" on the monument) and "the government does not subsequently adopt the message" inscribed on the monument. *Id.* (Summum's rewrite of Question 2). Summum embraces a recipe for jurisprudential and practical chaos. *See also* Reply to Opp. at 2.

This Court should reverse the Tenth Circuit's decision.

I. PLEASANT GROVE'S SELECTION AND DISPLAY OF MONUMENTS IN FIONEER PARK IS GOVERNMENT SPEECH TO WHICH SUMMUM HAS NO FIRST AMENDMENT RIGHT OF ACCESS.

As explained previously, a city's decision regarding what objects permanently to install on government property reflects the *government's* decision what

message or messages to communicate thereby, and thus is *government* speech. Hence, private parties have no First Amendment right to barge in with their own message. Pet. Br. § I; *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 833 (1995) (when government speaks, "it is entitled to say what it wishes").

Summum presses a battery of arguments in an effort to salvage its asserted First Amendment right to force its preferred monument upon the city. These arguments collapse under examination.

A. Summum's Proposed Constitutional Requirement, that Cities Must "Adopt" the Particular Inscriptions on Donated Monuments, Is Neither Sensible Nor Supported by this Court's Cases.

Summum first argues that when a private party donates a monument, a city does not in fact "control" the speech in question -- even though the city accepts, owns, controls, and selects that monument for display -- unless the city takes the additional step of specifically "adopting" any and all inscriptions on the monument. Resp. Br. § II(A).

This contention repeats the same "adoption" argument Summum made in opposition to certiorari, an argument the city has already debunked, *see* Reply to Opp. § I; Pet. Br. at 32-34. To summarize, Summum's argument for an "adoption of the inscription" requirement fails for the following reasons:

- A city may choose to display a monument *without adopting the particular writings*

engraved thereon, as in, for example, (1) a Holocaust display that quotes hateful language from Nazi leaders, not to endorse such language, but rather to hold it up for revilement and as a cautionary lesson, *see* U.S. Br. at 19; (2) a display that quotes positively contradictory messages, not to endorse them, but to show the diversity of public debate, *see, e.g.*, Rene Gutel, *Arizona's Sept. 11 Memorial Called Offensive*, All Things Considered (Dec. 19, 2006) (inscribed messages included "You don't win battles of terrorism with more battles" and "Must bomb back"); or, (3) a monument displayed for reasons having little or nothing to do with the particular content inscribed thereon (like the Rosetta Stone, or a sample page from the Dead Sea Scrolls).

- The *message* a monument conveys *can vary* depending upon the identity of the party displaying it. Thus, a sculptor or painter may wish to make a particular "statement" in a created work; a subsequent owner (be it governmental or private) may display the work to send an entirely different message, such as an aesthetic theme, a welcome to certain art forms, or merely a demonstration of sophisticated taste. Indeed, the "message" may transcend the particular objects on display. *See* FFE Br. at 14-15 ("The city need not adopt every word engraved on every monument as its own, but each item displayed contributes to the *overall message* concerning local pioneer history") (emphasis added). Summum's fixation upon the inscription wholly ignores the fact,

discussed above, that *the message* conveyed by a display *need not coincide with the inscription*. For example, in this case the "message" sent by displaying the Ten Commandments is *not* equal to the inscribed commands. The message of the original donors -- the Fraternal Order of Eagles -- was that the commandments provide a "useful" educational lesson for "young people to understand," JA 96-97. The city, in turn, upon acquiring control of the monument, displayed it to convey a *distinct* message, namely, "'to remind citizens of their pioneer heritage in the founding of the state,'" JA 97 (quoting mayor at unveiling ceremony). Given that "the message" of a monument display is neither fixed nor necessarily coextensive with the inscription, a city's "adoption of the inscription" would in very many cases be positively inaccurate and incompatible with the government's intended message.

- An "adoption of the inscription" requirement runs counter to this Court's jurisprudence. As this Court has recognized, government speech includes selecting and presenting messages that the government does not necessarily itself adopt, as with books in a library, items on display in a museum, speakers with contrary views in a lecture series, and so forth. *Arkansas Educational TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). *See* Pet. Br. at 27; FFE Br. at 11 ("Museums do not adopt the individual text engraved on every artifact. Public libraries do not endorse the words of every book"). In none of these cases does the First Amendment put

the government to the Hobson's choice of either "adopt[ing] the message . . . as its own," Resp. Br. at 36, or else forfeiting the government speech label and thereby opening itself up to First Amendment liability whenever the government declines to include the work of other private authors, artists, teachers, or lecturers. *Johanns*, 544 U.S. at 562.

B. Summum Identifies No Special Concerns that Warrant an "Adoption of the Inscription" Requirement.

Summum insists that an "adopt the inscription" rule is nevertheless necessary. None of Summum's arguments are persuasive.

1. Finished products

Summum declares an "adoption" requirement to be essential where the item in question is donated "as a completed work." Resp. Br. at 35. But this factual detail does not distinguish a book donated to a library, a work of art donated to a museum, or -- for that matter -- the commonplace situation of a finished monument being donated to a park (*see* Pet. App. I). As already explained, Pet. Br. at 36-38, that a government accepts a finished product does not change the constitutional rules. *Accord* U.S. Br. at 8. Just as a "public library does not . . . collect[] books in order to provide a public forum for the authors of books to speak," *United States v. American Library Ass'n*, 539 U.S. 194, 206 (2003) (plurality), likewise a government-run museum or park does not select items

for display to provide a forum for private speakers.

Summum protests that "what the government controls is only whether that privately-formulated message will be displayed." Resp. Br. at 36. But the government's control of the decision to display its own objects demonstrates precisely that it is the government that is speaking, regardless of whether that object bears a "privately-formulated message" (understanding, as discussed above, that the relevant "message" of the display may change when the display shifts to government hands). Deciding whether to display any given privately-formulated message is exactly what libraries, public television stations, and museums do. *Forbes*, 523 U.S. at 674. Whether the item displayed left private hands as a finished product or as something less complete is irrelevant. *Cf. National Endowment for the Arts v. Finley*, 524 U.S. 569, 611 (1998) (Souter, J., dissenting) ("if the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, he is free to prefer George Washington over George the Third").

If Summum were correct that the donor's complete surrender of control over an object did not convert the speech to government speech, then the First Amendment would limit not just which donations a city could refuse, but also which already-installed donated monuments a city could remove or relocate. Such a rule would generate no end of mischief.

2. Supposed threat to free speech

Summum opines that recognition of government speech here would sound the death knell for free speech. Resp. Br. at 37. Not so. The ability of a

government body to select private speakers for government panels, or to select privately crafted works for government schools, libraries, and museums, has happily coexisted with free speech for time out of mind. Merely recognizing what has always been the case -- that government managers of park property can decide what unattended, permanent items to install in a park -- cannot suddenly trigger the demise of the First Amendment.

Summum fears that "[a] school could . . . 'select' secular speakers for preferential access to its facilities and exclude religious speech," *id.* But Summum ignores the crucial difference between government owning and controlling speech for its own communicative purposes, as here, and, government facilitating diverse private messages, as in equal access cases. In the typical equal access case, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), the private speaker does not surrender control of the message to the school board, but instead avails itself of a forum the government has opened to private users. Here, by contrast, monument donors surrender all control over the monument to the city.

To be sure, a government cannot, Midas-like, magically transform private speech into government speech simply by "selecting" it for approval. But this case -- where a *government* body selects objects for *government* ownership, *government* control, and *government* display on *government* property -- does not even come close to raising such a spectre.

Summum insists that, because Pioneer Park is a traditional public forum, different rules should apply. Resp. Br. at 47-48. But this does not follow. The

rationale for government speech depends not upon the location of the speech, but upon government *control* of its own communication.

Summum professes alarm at the possibility that, under the government speech doctrine, a city could prefer certain speakers or viewpoints even in a public forum. *Id.* at 37. While Summum argumentatively describes this as government control of "access" to a forum, this is in fact merely a description of a government-organized, government-sponsored event. That a government program (e.g., a city museum's traveling sculpture exhibit) is held in a public park does not make it any less of a *government* program.

3. Role of ownership and permanence in analysis

Summum tilts at a straw man when it argues that the key is not government "ownership" or the "permanence" of a display, but rather government "control." *Id.* at 39-45. The city agrees with this proposition (though not with Summum's distorted application of it).[8] Ownership is not a prerequisite. The government speech doctrine equally shelters, for example, a museum's freedom to select what works to display regardless of whether the government owns the objects or merely hosts a private exhibit on loan. *See also* U.S. Br. at 14 n.5. Nor is permanence a

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[8] *See, e.g.*, Pet. Br. at 32 (citing example of permanent, government-owned display which nonetheless was a forum for private speech because the government deliberately opened such a forum, *viz.*, for purchase of private messages on blank memorial bricks). *See generally* Becket Fund Br.

prerequisite, as the museum analogy also illustrates (i.e., rotating the museum's displays does not generate a First Amendment right to horn in).

Nevertheless, ownership and permanence are indicia of government control and thus of government speech. Something the government owns, or leaves standing indefinitely in a public park, or (as here) both, is presumptively a government display. "[A]n unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., joined by O'Connor & Breyer, JJ., concurring in part and concurring in judgment). *Accord id.* at 785 (reasonable "to presume that an unattended display on government land . . . represents government speech"); *id.* at 804 (Stevens, J., dissenting) ("structures on government property . . . imply state approval of their message").

4. Government as editor

The city previously noted the well-established power of government to speak as "editor," i.e., by selecting or compiling its own speech by drawing from various preexisting expressive items. Examples of such "speech selection," IMLA Br. at 11, include assembling a library's inventory, selecting programming for public television, culling works for display in a museum, and -- as here -- choosing items for display on government properties. *See* Pet. Br. at 24-29; *Forbes*, 523 U.S. at 674.

Summum takes strong issue with this argument, contending that government cannot "edit" *private*

speech, especially in a public forum. Resp. Br. at 45-49. But calling the relevant speech "private" begs the very question at issue. True, a government cannot "edit" the content of the private speech of a private speaker. For example, in *Pinette*, the government could not constitutionally have modified the cross, menorah, or United Way thermometer displays that private parties had erected on the plaza there. Here, by contrast, the city owns and completely controls the items the city erects in Pioneer Park. Certainly, a government can edit *its own* speech, including when that speech is assembled by selecting materials from private sources. Thus, while a government cannot "edit" the messages on picketers' signs, it can most certainly edit which signs it chooses to include in a museum exhibit or a visitors center film. Pet. Br. at 26-29.

Summum concedes that a government may (indeed, must) exercise editorial discretion when it "performs a function that traditionally and by its very nature requires the exercise of discretion and selectivity." Resp. Br. at 14. Deciding what items fit with the city's chosen historic theme for Pioneer Park, like other municipal decisions regarding how to design a public space -- or, for that matter, like deciding what curriculum to use,[9] what books to stock, or what lecturers to invite to a series -- entails precisely such

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[9] *Cf. Chiras v. Miller*, 432 F.3d 606, 614 (5th Cir. 2005) (court invoked government speech doctrine to reject viewpoint discrimination claim, under First Amendment, where state board of education had approved various privately published texts for inclusion in public school curriculum but declined to approve plaintiff's science textbook, "when the [state board] . . . selects the textbook with which teachers will teach . . . it is the state speaking, and not the textbook author").

inevitable selectivity. The alternative -- chaos and clutter in government programs and properties -- is not a command of the First Amendment.

5. Quibbling with city's application of its criteria

Summum attacks the government speech doctrine in this case by denying the city's exercise of judgment. Summum says the city was too "passive[]" when it accepted prior displays. Resp. Br. at 51. But this assertion is inaccurate, *supra* note 3, and indeed contradicts Summum's factual stipulations, JA 50-51 (admitting city's "administrative power" over "displays on government property"). Moreover, unless the selection of *any* privately donated monument triggers an obligation to accept and display *all* -- which is apparently Summum's position -- there will always be a "first" rejection. Contrary to Summum's hermeneutic of distrust, Resp. Br. at 50, 52-53, being the first proposal turned down does not imply "distaste" for the speaker, *id.* at 53. *See also supra* p. 3 (no viewpoint bias here). This is especially so in this case, where Summum has conceded that it "does not factually meet" the pertinent threshold criteria for government selection of its proposed monument. Pltf's Stipulation of Fact (Doc. 152) at 2; *see* Pet. Br. at 7 & n.3.

6. Joint speech

Summum raises the conceptual possibility of joint private/government speech. Resp. Br. at 44-45. Certainly such a category can exist, as when an event (say, an anti-child abuse symposium) is cosponsored by

governmental and private entities. But even in cases of joint speech, the government retains control over *its* role in the event. Joint government sponsorship of a "No Smoking" event with a private entity does not give pro-smoking speakers a First Amendment right onto the dais; nor does it compel the government to jointly sponsor a competing event with the tobacco industry. In any event, here there is no cosponsorship or joint expression: the donors of the various displays surrendered control over those objects to the city (as when an art collector surrenders a work to a museum or a publisher surrenders a book to a library).

7. Political accountability

Summum contends that treating government-owned, government-displayed monuments as government speech "would allow the government to speak without the democratic accountability that justifies the government speech doctrine." *Id.* at 13. But as this Court has explained, "when the government speaks, . . . it is, in the end, accountable to the electorate and the political process . . . . If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000). Here, "the city council always had the final say," JA 180, regarding monument display and placement. City council members were and are politically accountable for their votes on this, as on other matters.

Indeed, political accountability is actually *enhanced* in this context. "Unlike line items in a complex budget, monuments cannot be hidden from public view. There is no need for a 'sunshine law' to

expose monuments to political commentary." IMLA Br. at 17. *See also* JA 103, 123 (public unveiling ceremony and official acceptance letter for monument).

Summum presents no reason not to conclude that a city's decision how to design its own public spaces is exclusively a government prerogative which, to the extent speech is involved, represents government speech. No private party can insist, as a matter of First Amendment law, upon inclusion in the government's message.

II. PIONEER PARK IS NOT A FORUM FOR PRIVATE, PERMANENT, UNATTENDED MONUMENTS.

As explained earlier, the city's selection of monuments to place in Pioneer Park represents no more than government management of its own property to communicate its own message. Any constitutionally relevant speech involved is the government's speech. Hence, no "forum analysis" is necessary. Pet. Br. at 49.

Importantly, the city has in no way restricted Summum's speech. *Accord Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (ban on affixing unattended fliers "does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place"). Summum adherents can leaflet, picket, and orate to the same extent as any other person using the grounds of Pioneer Park. *See also* IMLA Br. at 4. In fact, "government speech symbolized by monuments

actually provides a focal point for large-scale private speech, such as anti-war protests." *Id.* at 5.

Summum can erect the monuments of its choosing on its own property, just as the city erects the monuments of its choosing on its own property. But Summum can no more legally compel the city to erect Summum's monument on city property, than the city could compel Summum to erect any given monument on Summum's property.

The city carefully explained how none of this Court's forum categories would support Summum's asserted right to impose its monument upon the city. Pet. Br. § II. Summum has not responded to this category-by-category analysis, and thus has conceded that, at least absent viewpoint discrimination (which Summum has *not* shown, *supra* p. 3, and which was *not* the basis for the Tenth Circuit's decision), Summum's claim fails under the analysis governing designated public fora, nonpublic fora, and (as here) contexts where there is no speech forum at all.

A. The Park Is Not a Traditional Public Forum for Private, Unattended, Permanent Monuments.

Summum does, however, press its claim under the rubric of free speech in "traditional public fora." Resp. Br. § I. This is curious, as Summum concedes that, "despite Pioneer Park's status as a traditional public forum," the city "could limit unattended displays to government displays," *id.* at 19. That, of course, is precisely what Pleasant Grove has done. The city owns and controls all of the monuments and other objects on display in Pioneer Park. Pet. Br. at 5. Any private item

left unattended in the park would essentially be litter subject to removal. *See* Pleasant Grove Ord. 97-7, adopted 4-15-1997, codified at § 7-2-11 (prohibiting littering in public places).

Summum concedes that a total ban on unattended private displays would represent a constitutionally permissible "manner" restriction on speech even in a traditional public forum. Resp. Br. at 18-19. Since that is all that is at issue here, Summum's First Amendment claim must fail.

The *Pinette* case, which Summum invokes, provides an illustrative counterpoint. In *Pinette*, the government *did*, by policy and practice, open its property to private, unattended, temporary displays. 515 U.S. at 757-58. Here, by contrast, private parties do not have permission to erect monuments on city park grounds. *Cf.* JA 51, 97, 103 (monument only placed after donation to city and with "specific permission and approval" of city council). These facts are not disputed, and they foreclose Summum's claim.

To the extent *Pinette* is relevant, the opinions therein militate in favor of the city, not Summum. The Court made clear that a ban (as here) on all unattended private displays would be constitutional. 515 U.S. at 761 (majority), 783 (concurrence of Justices Souter, O'Connor, & Breyer), 802-04 (dissent). "The fact that [government property] has been the site of public protests and gatherings, and is the location of any number of the government's own unattended displays, such as statues, does not disable the State from closing the square to all privately owned, unattended structures." *Id.* at 783-84 (Souter, J., concurring in part and concurring in judgment).

Notably, the concurrence of Justice O'Connor in *Pinette* flagged the important "distinction between speech the government *supports* and speech that it merely *allows* in a place that traditionally has been open to a range of private speakers," *id.* at 782 (O'Connor, J., joined by Souter & Breyer, JJ., concurring in part and concurring in judgment) (emphasis added). Here, the city exclusively erects monuments that it not just "supports," but actually owns and controls. The city does not "allow" a range of -- or even any -- private speakers to put up their own monuments.

The State's allowance of privately erected, privately controlled, unattended displays in *Pinette* thus represented a departure, *on the facts*, from the normal case, not a holding, *on the law*, that all parks are traditional public fora for unattended private displays. Indeed, such a holding would have been flatly inconsistent with the stated approval, by a majority (and arguably by all) of the Justices, of a total ban on such private displays. *See also* IMLA Br. at 3 (recognition of a "public forum for monuments" would be harmful because "[p]ublic forum analysis leaves cities with nothing but the crowd control tools suitable for public assemblies").

Speech in a traditional public forum has always been understood to be transitory speech, i.e., cases where "individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene." *Taxpayers for Vincent*, 466 U.S. at 809. *See also* Pet. Br. at 43. It has never been understood to mean permanent private speech, just as it has never

been understood to mean vandalism, for example, spray painting one's views on government property, even if that property is a city park. No one can seriously suggest that a practice of private citizens affixing two-ton concrete memorials or statues to public park grounds is an activity that is traditionally associated with such public spaces.

B. Summum Has Not Shown a Cognizable Case of Viewpoint Discrimination.

Undaunted, Summum charges the city with viewpoint bias in declining to accept and display a Seven Aphorisms monument. That argument is wrong on both the facts and the law. On the facts, Summum has failed to carry its burden of showing viewpoint discrimination. *Supra* p. 3. Here, the city denied Summum's request because that request -- concededly, Pet. Br. at 7 & n.3 -- did not meet the city's threshold eligibility criteria. And on the law, "viewpoint bias" is not a cognizable basis for challenging a government's formulation of its own message, *Johanns*, 544 U.S. at 553 ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny"). Anytime a government body adopts a policy position, it necessarily rejects contrary views. That is not "viewpoint discrimination" under the First Amendment; it is "policy selection" as part of representative democracy. *See generally* James Madison Center Br. at 8-13 (providing examples in which government speech is derived from policy choice to accept private proposals); *id.* at 10 ("If private participation automatically converts government speech into a forum that requires viewpoint neutrality,

the government's ability to advance or support certain public policy goals would be severely undermined"). Those who object to such political judgments have recourse to the ballot box, not the federal courthouse.

Summum protests that a government's selection of one group's proposed monument for display, and not another's, would, for example, "privilege a private viewpoint about September 11th over Summum's views," Resp. Br. 25. The short answer is that a city can choose, for example, to accept and display a 9/11 memorial and not an Al-Qaeda monument praising the terrorists. A city can likewise decline a Seven Aphorisms monument, or any other of an infinite list of possible memorials, good and bad. "[A]ny choice of which version of history to commemorate in permanent monuments necessarily includes viewpoint." IMLA Br. at 4. Or rather, each such decision represents a government policy choice about the message the government wishes to communicate. The First Amendment does not compel a government that takes ownership of one private party's point of view to embrace all others as well. Otherwise a government that chose to honor fallen soldiers would also have to erect donated monuments criticizing those soldiers, and a city that chose to memorialize the Compton's Cafeteria riots[10] would also have to accept and display Rev. Fred Phelps's monument declaring that Matthew Shepard's soul "[e]ntered Hell."[11] Short of Establish-

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[10] *See* Lisa Leff, *As gay pride hits stride, transgendered find more acceptance*, USA Today (June 24, 2006) (plaque installed to commemorate 1966 transgender riot against police).

[11] John Morgan, *Phelps wants anti-gay monument*, Casper Star Tribune (July 17, 2007), Casper Br. at 2-3 (quoting proposed

ment Clause constraints, which are not at issue here,[12] such government policy choices, regarding what message the government wishes to send, are not the stuff of First Amendment violations.

C. The Access Summum Seeks Is to the City's Monument Selection Process, Which Is Not a Forum for Free Speech.

The city has explained, Pet. Br. at 41-42, that under this Court's precedents, *see Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985), the pertinent forum (if any) would be the city's monument selection process, and not the mere physical property on which the monuments in Pioneer Park ultimately sit. *See also Taxpayers for Vincent*, 466 U.S. at 814 (relevant forum is utility poles, not streets and sidewalks on which they sit).

Summum disagrees, contending that the pertinent forum is the park itself, not the city's monument placement program to which Summum seeks forced access. Resp. Br. at 26-30.

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inscription)

[12]Summum attempts to smuggle an Establishment Clause issue in through the back door in this case. Resp. Br. at 12, 20, 34 n.11, 53. This is at best a distraction. Summum did *not* bring a federal Establishment Clause claim in this case. *See* JA 18-20. This was clearly a conscious, strategic choice. *See* Pet. Br. at 7-8 & n.4 (noting that Summum's trial counsel brought, and then dismissed, an Establishment Clause claim against Pleasant Grove in a separate lawsuit). Summum's argument for a preliminary injunction, both in the district court and on appeal, rested exclusively upon its asserted federal free speech rights, which are all that is before this Court.

Summum's attempt to explain away *Cornelius* is unavailing. Summum cites *Pinette*, but that case is inapposite: private speakers undisputedly had access to the plaza to deposit displays, so the plaza was the only possible forum. Moreover, in neither *Pinette*, nor in the other cases Summum cites, did private speakers seek to have *the government* acquire control of and display the speech. Summum's request is therefore unique.

Ultimately, this debate over the identity of the forum (if any) is academic. Whether the city has properly asserted exclusive authority over its own park management program, as petitioners argue, or has imposed a legitimate "manner" restriction by banning private unattended displays in a public park, using Summum's preferred analysis, the result is the same: Summum has no First Amendment right to impose its monument upon the city park.

III. THE TENTH CIRCUIT'S APPROACH WOULD CREATE ENORMOUS PRACTICAL PROBLEMS.

The city has already explained why the Tenth Circuit's ruling in this case would create -- indeed, has already begun to create -- a practical nightmare for government management of its public spaces. Pet. Br. § III; *see also* Casper Br. at 1-3, 19-23. Summum's only real "answer" is that a city, to escape this nightmare, must formally "adopt" any inscription on any donated monument. As discussed *supra* § I(A), this "option" is neither constitutionally required nor sensible. Moreover, the process whereby the city in this case acquired and decided to display various items on its

park property is by no means atypical. IMLA Br. at 15-16.

In fact, a comparison between Pleasant Grove's acceptance and placement of the Ten Commandments monument donated by the Eagles, and the 1877 Congressional Resolution (Appendix A) accepting the Statue of Liberty, reveals striking similarities as to the manner of acceptance, placement, and purpose of these monuments.

Just as the President of the United States was "authorized and directed to accept" the Statue of Liberty, the monument donated by the Eagles was erected "with the specific permission and approval of Pleasant Grove and its governing council," JA 51, and was "accepted by Mayor Jack Cook and Utah County Commissioner[] Stanley Roberts," JA 103.

Just as Congress directed the President "to designate and set apart for the erection" of the Statue of Liberty "a suitable site upon either Governors or Bedloes Island, in the harbor of New York," the Mayor of Pleasant Grove directed "that a letter be written the Fraternal Order of Eagles accepting the monolith of 'The Ten Commandments' and stating it would be placed in a prominent place in the Rose Garden Park," JA 123.

Just as the "citizens of the French Republic" were to "erect[] at their own cost a colossal bronze statue of 'Liberty enlightening the world,'" the Fraternal Order of Eagles "paid for the creation and installation of [the Ten Commandments] monolith," JA 51.

Just as the completion of the Statue of Liberty was "to be inaugurated with such ceremonies as will serve to testify the gratitude of our people for this expressive and felicitous memorial of the sympathy of the citizens

of our sister Republic," the "unveiling ceremony" of the Ten Commandments monument "took place in connection with the Fraternal Order of Eagles sixty-first convention," where "Mayor Cook said he thought the monument 'would serve to remind the citizens of their pioneer heritage in the founding of the state,'" JA 103.

If Pleasant Grove did not go far enough in demonstrating "government speech" in accepting and placing the Ten Commandments monument in 1971, neither did Congress in accepting the Statue of Liberty in 1877. And if the Statue of Liberty remains private speech, despite government acceptance, placement, and purpose -- the same government acceptance, placement, and purpose found in Pleasant Grove -- then Congress should be prepared to make room for a Statue of Tyranny.

CONCLUSION

This Court should reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

J. Res. 6, 44th Cong. (2d Sess. 1877) ("Joint resolution authorizing the President to designate and set apart a site for the colossal statue of 'Liberty enlightening the world' and to provide for the permanent maintenance and preservation thereof"):

> Whereas, the President has communicated to Congress the information that citizens of the French Republic propose to commemorate the one hundredth anniversary of our independence by erecting at their own cost a colossal bronze statue of "Liberty enlightening the world" upon a pedestal of suitable proportions to be built by private subscription upon one of the islands belonging to the United States in the harbor of New York, and
>
> Whereas it is proper to provide for the care and preservation of this grand monument of art and of the abiding friendship of our ancient ally: Therefore,
>
> *Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the United States be and he is hereby authorized and directed to accept the colossal statue of "Liberty enlightening the world" when presented by citizens of the French Republic, and to designate and set apart for the erection thereof, a suitable site upon either Governors or Bedloes Island, in the harbor of New York; and upon the completion

thereof shall cause the same to be inaugurated with such ceremonies as will serve to testify the gratitude of our people for this expressive and felicitous memorial of the sympathy of the citizens of our sister Republic; and he is hereby authorized to cause suitable regulations to be made for its future maintenance as a beacon, and for the permanent care and preservation thereof as a monument of art, and of the continued good will of the great nation, which aided us in our struggle for freedom.

Approved March 3, 1877.

AMICUS CURIAE BRIEF

13

No. 07-665

In the Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL., PETITIONERS

v.

SUMMUM

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Free Speech Clause of the First Amendment to the United States Constitution entitles a private group to insist that a municipality permit it to erect a permanent monument in a city park that currently contains a number of objects donated by other private individuals and groups and accepted by the municipality for display in the park.

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INTEREST OF THE UNITED STATES

This case concerns whether the Free Speech Clause of the First Amendment to the United States Constitution entitles a private group to insist that a municipality permit it to erect a permanent monument in a city park that currently contains a number of objects donated by other private individuals and groups and accepted by the municipality for display in the park. The United States has a substantial interest in the resolution of that question. The National Park Service manages 391 park units, which span more than 84 million acres throughout the United States and its territories. National parklands contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, a great deal of the public sculpture in Washington, D.C.,

and all but one of the 1324 monuments, markers, tablets, and plaques on display at Vicksburg National Military Park. There are also numerous privately donated objects on permanent display on military bases, in government-owned museums, and on other government property. See App., *infra*, 1a-11a. The United States has participated as a party or amicus curiae in prior cases addressing the scope of the government speech doctrine. See *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998); *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666 (1998).

STATEMENT

1. Pioneer Park (Park) is a 2.5 acre public park located in the Historic District of petitioner Pleasant Grove City, Utah (the City). J.A. 98-99. Pioneer Park appears to have been established in the 1940s, J.A. 101, and it currently contains 15 permanent displays, J.A. 99-102, at least 11 of which were donated to the City by private individuals and groups.[1] The privately donated displays include a wishing well donated by the Lions Club in 1946; a millstone from the City's first flour mill donated by a local resident in 1967; a Ten Commandments monument donated by the Fraternal Order of Eagles (Eagles) in 1971; park benches donated by the Pleasant Grove Garden Club in 1977; a stone from the original Mormon Temple in Nauvoo, Illinois donated by

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[1] A November 14, 2005 declaration by the city administrator states that Pioneer Park "contains" 16 specified displays, including a "First Log Cabin" that was "[d]onated by Joe Spencer in September, 2005." J.A. 99, 102. In depositions taken on November 17, 2005, however, both the city administrator and the City's then-mayor clarified that that log cabin had yet to be placed in the Park. J.A. 134-135, 190.

a City resident in 1978; a historic winter sheepfold donated by a private company in the 1990s; an 1874 granary donated by City residents around 2000; the City's first fire station donated by a local resident upon her death; two separate displays consisting of a tree and a plaque that were donated by the Pleasant Grove City Court/Council and 4-H; and a brick monument commemorating the events of September 11, 2001, that was constructed by a local Eagle Scout and his troop with the support of the Pleasant Grove Firefighters and several local businesses. J.A. 99-102, 167-168, 171, 173-174, 178. The other permanent displays include the oldest known school building still standing in Utah; the original Pleasant Grove Town Hall; a rose garden planted in honor of two longtime City residents; and a log cabin built in 1930. J.A. 99, 101; see J.A. 105-120 (photos of 12 of the 15 permanent displays).

Respondent is a church that was founded in 1975 and is headquartered in Salt Lake City, Utah. J.A. 13. In September 2003, respondent's president wrote two letters to the City's mayor requesting permission to erect in Pioneer Park a "stone monument" that would be "similar in size and nature" to the Ten Commandments monument donated by the Eagles in 1971 and would contain "the Seven Aphorism of SUMMUM." J.A. 57; see J.A. 59. Although the initial letter stated that respondent's faith "is based upon teachings that precede the ancient Egyptians" and that "[t]hose teachings are summarized in our Seven Aphorisms," J.A. 57, neither letter quoted the Aphorisms nor said anything about the content of the proposed monument, J.A. 57-60.[2]

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[2] According to the Tenth Circuit's decision in *Summum* v. *City of Ogden*, 297 F.3d 995 (2002), the Seven Principles Monument at issue in

The City denied respondent's request. J.A. 61-62. In a November 2003 letter explaining the decision, the City's mayor wrote that the City's "practice—established over many decades—has been to limit structures, displays, monuments, etc." in Pioneer Park to items "which either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with long-standing ties to the Pleasant Grove community." *Ibid.*; accord J.A. 102-103.[3]

In August 2004, the Pleasant Grove City Council passed a resolution (2004 resolution) regarding the permanent placement of objects on public lands. Pet. App. 1h-4h. According to a declaration from the city administrator, the 2004 resolution "put in writing [the City's] decades-old policy regarding such donations." J.A. 104. The 2004 resolution states that "approval must be obtained from the City Council" before "any permanent object such as plaques, structures, displays, signs, and monuments [may be] placed on public property." Pet. App. 2h. It provides that "[r]equests for placement or offers of donation" shall be made initially to the Director of Leisure Services (Director), a government official, and should contain "[a] brief description of the proposed item including the item's dimensions, along with any available photographs, drawings[,] artist's renderings, etc. and a description of the proposed placement location." *Ibid.* The Director is to then submit the request to the City Council "for their consideration and acceptance or denial." *Ibid.*

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that case would have included the Principles of "Psychokinesis," "Correspondence," "Vibration," "Opposition," "Rhythm," "Cause and Effect," and "Gender." *Id.* at 998 n.2.

[3] Before the court of appeals, respondent asserted that it did not receive the November 2003 letter. Pet. App. 3a n.1.

The 2004 resolution outlines various criteria that "[t]he City Council shall consider * * * before accepting offers to place" a covered item on public property. Pet. App. 2h. Under those criteria, a proposed display must either "directly relate to the history of Pleasant Grove and have historical relevance to the community," or be donated "by an established Pleasant Grove civic organization with strong ties to the community" or donors who "have a historical connection with Pleasant Grove City." *Id.* at 2h-3h; see *id.* at 3h (identifying eight subfactors concerning historical relevance). The City Council must also determine that the object "does not create any safety hazards" and "is not obscene." *Id.* at 4h. If the object "meets the above-listed criteria," the City Council must also "consider the proposed location of the item and evaluate the aesthetics of the proposed placement, the effect said placement will have on the remaining open space on the public property, any safety issues, and any other visual or practical effects of locating the item on the proposed site." *Ibid.* And "[b]ased upon the factors listed, the [City Council] shall make the final determination as to whether the item shall be accepted and where the item shall be placed." *Ibid.*

In May 2005, respondent's president again wrote to the City's mayor asking permission to erect a monument in Pioneer Park and stating that respondent would assume that its request had been rejected unless it received a response within ten days. J.A. 63-64. As with respondent's previous letters, the May 2005 letter did not describe the proposed monument beyond stating that it "would contain the Seven Aphorisms of SUMMUM and would be complementary in content and appearance to the Ten Commandments monument." J.A. 63. Nor did the letter assert that the proposed monu-

ment would have historical relevance to the City or that respondent had present ties with, or a historical connection to, the community. After evaluating the renewed proposal pursuant to the 2004 resolution, the City Council rejected respondent's request, J.A. 104, and did not respond to respondent's letter, Pet. App. 3a.

2. In July 2005, respondent filed suit against the City and various current and former City officials (collectively, petitioners), alleging that the refusal to permit respondent to install its proposed monument in Pioneer Park violated the Free Speech Clause of the First Amendment to the United States Constitution, as well as the Free Expression and Establishment Clauses of the Utah Constitution. J.A. 18-20. Respondent sought preliminary injunctive relief, relying exclusively on its federal free speech claim and asking the district court to direct petitioners to permit respondent "to immediately erect a monument comparable to the Ten Commandments monument in the relevant city park." C.A. App. 86-87. The district court orally denied respondent's motion for a preliminary injunction, concluding that "[i]t is not clear and it has not been established that there is a substantial likelihood of success on the merits." Pet. App. 3b; see *id.* at 1c (minute order).

3. The court of appeals reversed and remanded with instructions to enter a preliminary injunction. Pet. App. 1a-23a. The court noted that it had "previously characterized a Ten Commandments monument donated by the Fraternal Order of Eagles and placed by [another] city on public property as the private speech of the Eagles rather than that of the city," and it rejected respondent's contention that this Court's subsequent decision in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), required it

"to treat the Ten Commandments monument as government speech." Pet. App. 3a n.2.

The court of appeals next determined that it "must engage in a 'forum analysis'" in assessing the constitutionality of petitioners' actions. Pet. App. 8a. It acknowledged that this Court "has chosen not to apply forum principles in certain contexts" that involve "selecting what private speech to make available to the public," but it concluded that forum analysis was appropriate here because the City was not "acting in its capacity as librarian, television broadcaster, or arts patron." *Id* at 13a n.4. The court described the relevant forum as "[t]he permanent monuments in [Pioneer Park]," *id.* at 9a, determined that the Park as a whole constituted a traditional public forum, *id.* at 10a-13a, and concluded that the City's content-based criteria for accepting monuments for permanent display were subject to strict scrutiny, *id.* at 13a-14a. The court of appeals further held that the exclusion of respondent's proposed monument was unlikely to satisfy strict scrutiny, *id.* at 15a-16a, and that the remaining factors likewise supported the grant of preliminary injunctive relief, *id.* at 20a-23a.

4. The court of appeals denied rehearing en banc by an equally divided vote. Pet. App. 1f-27f.

a. Judge Lucero filed an opinion dissenting from the denial of rehearing en banc. Pet. App. 3f-9f. He "agree[d] with the panel that the[] monuments [currently in Pioneer Park] do not constitute government speech," *id.* at 3f, but was of the view that "a park is not a traditional public forum insofar as the placement of monuments is concerned," *id.* at 7f, and that the City was thus allowed to make "reasonable content-based, but viewpoint-neutral, decisions as to who may install monuments in the parks," *id.* at 8f.

b. Judge McConnell also filed an opinion dissenting from the denial of rehearing en banc, which Judge Gorsuch joined. Pet. App. 10f-17f. In his view, "any messages conveyed by the monuments [in Pioneer Park] are 'government speech,' and there is no 'public forum' for uninhibited private expression." *Id.* at 12f.

c. Chief Judge Tacha, who had authored the panel's opinion, filed a response to the dissents from denial of rehearing en banc. Pet. App. 18f-27f.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the First Amendment's Free Speech Clause entitled respondent to a preliminary injunction compelling the City to permit it to erect its own stone monument in Pioneer Park. As this Court has repeatedly recognized, when the government speaks, it—like any other speaker—is entitled to shape and control its own message. The selection of objects for permanent display on government property, particularly when the objects themselves are owned by the government, constitutes core government speech. That conclusion is not altered by the facts that the City did not direct the original design of the objects currently on display in Pioneer Park, that many of them were donated by private parties, or that the City has not taken specific steps to adopt or disavow all possible messages conveyed by the individual objects. The same could be said of countless displays in government museums, collection decisions by government libraries, and statues and other commemorative objects on battlefields and other parks. Because the Free Speech Clause does not restrict the government's own speech, the conclusion that the selection of objects for permanent display in Pioneer Park—and the message conveyed by their dis-

play—itself constitutes government speech is sufficient to dispose of respondent's free speech claim.

Even if this Court were to conclude that some of the items currently on display in Pioneer Park constitute purely private speech, respondent's free speech claim would still fail. Municipal parks are traditional public fora with respect to speeches, demonstrations, and other acts of private expression that are limited in duration. This Court's decisions make clear, however, that the nature of a forum is determined by the type of access being sought as well as the status of the underlying property. There is (to say the least) no longstanding tradition of private parties erecting permanent monuments in public parks on their own accord. Nor has the City created such an unconventional "forum" by permitting the indiscriminate installation of privately owned or donated objects in Pioneer Park. Accordingly, because Pioneer Park is, at most, a nonpublic forum with respect to the permanent display of privately donated objects, respondent could not succeed on a free speech claim without showing either that the City's selection criteria are unreasonable or that they have been applied in a viewpoint discriminatory manner. The present record does not support either conclusion.

Historical and practical considerations reinforce the conclusion that the decision below cannot stand. Statues and commemorative objects displayed in public places, parklands, and battlefields across the country help tell the story of the Nation's history and heritage, and may convey important government messages. The constitutional rule adopted by the court of appeals would seriously erode the discretion that the government has always enjoyed to shape those messages as it sees fit by determining which monuments or objects to display, and

thus potentially transform the content, character, and solemnity of such displays. For example, under the decision below, a city's display of a privately donated monument to Abraham Lincoln could entitle an individual to insist that the city permit the erection of a monument to Jefferson Davis, or a group could insist that the presence of the memorial in Pioneer Park commemorating the September 11 attacks entitles it to erect a memorial to the terrorists who carried them out. There is no historical precedent for such a counter-intuitive regime, it finds no support in this Court's cases, and our Constitution does not compel it.

ARGUMENT

THE FREE SPEECH CLAUSE DOES NOT ENTITLE RESPONDENT TO ERECT ITS PROPOSED STONE MONUMENT IN PIONEER PARK

Respondent claims that the Free Speech Clause of the First Amendment to the United States Constitution entitles it to insist that the City permit it to erect a permanent monument in Pioneer Park containing the Seven Aphorisms of Summum. Believing that claim had merit, the court of appeals ordered the entry of a preliminary injunction requiring the City to allow respondent to erect its monument. That decision is seriously flawed and should be reversed by this Court.[4]

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[4] Respondent does not contend that the display of the Ten Commandments monument in Pioneer Park violates the federal Establishment Clause, nor does it assert that the City violated either the Establishment Clause or the Free Exercise Clause of the United States Constitution by refusing to accept and display respondent's own proposed stone monument. See J.A. 18-20 (complaint); Pet. 7; Br. in Opp. 21. Instead, the only claim before this Court is based solely on the Free Speech Clause. Pet. i; Br. in Opp. i.

A. The City's Selection Of Objects For Permanent Display In Pioneer Park Is Government Speech And Is Therefore Not Subject To Scrutiny Under The Free Speech Clause

1. The Free Speech Clause limits government interference with private speech; it does not place any limit on the government's own speech. "[S]ome government programs involve, or entirely consist of, advocating a position," *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005), and "[i]t is the very business of government to favor and disfavor points of view," *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment). Thus, "when the State is the speaker, * * * it is entitled to say what it wishes," *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995), and it "may legitimately" seek "to communicate to others an official view as to proper appreciation of history, state pride, and individualism," *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977). Accord *Columbia Broad. Sys.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"). These principles apply equally when the entirety of a particular communication is formulated and delivered by government officials, see *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 12-13 (1990), as well as when the government relies in whole or in part on "private entities to convey a governmental message," *Rosenberger*, 515 U.S. at 833. See *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 530, 541 (2001); *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 529 U. S. 217, 234-235 (2000); *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U.S. 666, 674-675 (1998); *Rust* v. *Sullivan*, 500 U.S. 173, 194-195 (1991).

The fact that the Free Speech Clause does not limit the government's own speech does not leave those who object to such speech without recourse. "Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents." *Keller*, 496 U.S. at 12. As a result, "[w]hen the government speaks * * * it is, in the end, accountable to the electorate and the political process for its advocacy." *Southworth*, 529 U.S. at 235. "If the citizenry objects" to what its government chooses to say, "newly elected officials later could espouse some different or contrary position." *Ibid.* In addition, like any other government action, acts designed to lend the government's own voice to the marketplace of ideas remain subject to other constitutional constraints. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 572 n.2 (1975) (Rehnquist, J., dissenting).

2. The selection and permanent installation of objects for commemorative purposes in Pioneer Park constitutes core government speech. The display of monuments and commemorative objects is a common method of telling the story of the history or heritage of a place. Indeed, even the simple act of consecrating a place may speak for the ages. Cf. Abraham Lincoln, *Gettysburg Address* (1863). To varying degrees, the display (and assembly) of monuments may likewise convey an important government message. The monuments displayed in Pioneer Park represent the City's own judgment as to what displays appropriately reflect its history and heritage. See pp. 2-3, 5, *supra*.

The land on which Pioneer Park sits is government property, and this Court has recognized the commonsense proposition that an object's display on real property generally constitutes an expressive act by the prop-

erty owner. See *City of Ladue* v. *Gilleo*, 512 U.S. 43, 56 (1994) (signs on residential property); see also *Van Orden* v. *Perry*, 545 U.S. 677, 691 (2005) (plurality opinion) (referring to how "Texas has treated its Capitol grounds monuments"); *id.* at 701 (Breyer, J., concurring in the judgment) (observing that the physical setting of the Ten Commandments monument suggested that the "State itself" intended for the monument's nonreligious aspects to predominate); *id.* at 740 (Souter, J., dissenting) (referring to "the point that the government of Texas is telling everyone who sees the monument") (footnote omitted). Government property is, of course, different from private property in a number of ways, and certain kinds of public property are, either as a result of long tradition or affirmative act by the government, forums for certain kinds of private expression. See pp. 23-24, *infra*. But there is (to say the least) no tradition of granting private parties an unfettered right to erect permanent displays on public parklands across the country, and the City has never done so with respect to the parkland in this case.

Indeed, the City has done far more than merely "confine the content and topic of" messages conveyed by items placed in Pioneer Park. *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 303 (2000). Rather, the overall message conveyed by the permanent displays in the Park is "effectively controlled by" the City Council through its exercise of "final approval authority" over the selection and placement of each individual item displayed in the Park. *Johanns*, 544 U.S. at 560-561. The 2004 resolution declares that no object may be permanently affixed to City property unless it is first "accepted" by the City Council pursuant to review criteria established by the Council itself. Pet. App. 4h; see J.A.

51, 90 (stipulation that the Ten Commandments monument was installed with the "specific permission and approval of Pleasant Grove and its governing council").

The City's ownership of all or nearly all of the items currently on permanent display in Pioneer Park underscores that the display constitutes government speech. See J.A. 100-102 (specifically identifying seven items as having been "[d]onated" to the City); J.A. 166 (city administrator stating that the City "owns" the Old Bell School).[5] As the owner of the objects, the City would be entitled to arrange, modify, or remove any of them without regard to the wishes of any previous owners. See *Serra* v. *General Servs. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988) (concluding that artist had "relinquished his own speech rights in [a] sculpture when he voluntarily sold it to GSA," and thus could not object to its removal from a given location on public property). That continuing exercise of control over the completed display and its constituent parts is entirely incompatible with the notion that the City's purpose in permitting the permanent installation of objects in Pioneer Park was "to encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, or "to facilitate private speech," *Velazquez*, 531 U.S. at 542. It would be startling if the First Amendment were construed to compel the government to accept title to property it does not want, or to accept the permanent storage on its land of such a monument or other fixture. Governments, like

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[5] That is not to say that ownership of an object is invariably *necessary* to make its display an act of speech by the party on whose property the display occurs. For example, an agreement to display a sign endorsing a political candidate in one's front yard constitutes speech by the property owner, regardless of whether the sign itself is owned by the candidate's campaign.

private persons, have long been understood to have the freedom not to own, as well as to own, property; to decline, as well as to accept, gifts; and to refuse to have their land permanently encumbered with another's property. The government's exercise of control over what objects will permanently adorn public lands does not "distort" any background principle of property law or widespread social practice. *Id.* at 543. To the contrary, it reflects both.

The fact that the City neither designed nor built most of the objects on display in Pioneer Park—including not only the Ten Commandments monument, but also the wishing well, the millstone, the stone from the Mormon Temple, the winter sheepfold, and the granary, see pp. 2-3, *supra*—does not change the analysis. The government speech at issue does not lie in the physical characteristics of the individual objects on display. It is possible that some of those objects, standing alone and without any context, would convey no discernable message at all. Rather, the City's speech consists of the determination of which objects will—and which objects will not—further the historical and commemorative purpose of Pioneer Park and the City's approval of the message that the permanent installation and display of accepted objects on public land conveys.

To be sure, the City did not design each individual monument or object displayed in Pioneer Park. But a person or entity need not "generate, as an original matter, each item featured in the communication" in order to be regarded as a speaker with protected discretion to convey a desired message. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995). Rather, the decision of which preexisting materials to incorporate into a larger communi-

cation is itself an act of speech by the person or entity that does the selecting. See *e.g.*, *ibid.* ("edited compilation of speech generated by other persons" and "selection of contingents to make a parade"); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 636 (1994) (cable operator's "exercis[e] [of] editorial discretion over which stations or programs to include in its repertoire" (quoting *Los Angeles* v. *Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)). Accordingly, regardless of whether the permanent display in Pioneer Park "produce[s] a particularized message," each of the individual items reflects an individualized judgment by the City Council of "what merits celebration" in that setting. *Hurley*, 515 U.S. at 574.

For similar reasons, the governmental nature of the permanent display in Pioneer Park is not altered by the fact that most of the individual items were originally donated in their completed form by private parties. See pp. 2-3, *supra*. Throughout our Nation's history, federal, state, and local governments have sought to communicate various ideas and ideals by displaying monuments and other commemorative objects on public parkland. At times, the government itself constructs or purchases the object, such as the Washington Monument, whose construction was completed by the Army Corp of Engineers,[6] or the statue of Ulysses S. Grant that stands in front of the United States Capitol, which was paid for

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[6] See National Park Service, *Washington, D.C.: A National Register of Historic Places Travel Itinerary, Washington Monument* (visited June 23, 2008) <http://www.nps.gov/nr/travel/wash/dc72.htm>. Many of the individual stones that make up the Washington Monument were donated by private groups. See George Olszewsi, *A History of the Washington Monument 1844-1968* 12 (1971).

wholly with funds appropriated by Congress.[7] At other times, the government commissions monuments and other works of art to be created by private parties with private funds, subject to the right of design approval and ultimate acceptance by the government. Examples of such works include the Vietnam Veterans Memorial,[8] and the currently in progress Martin Luther King, Jr. National Memorial in Washington, D.C.[9] See also App., *infra*, 1a-11a. Finally, governmental entities often choose to accept and display objects conceived and created entirely by other parties. The Statue of Liberty, to name one, was a gift to the United States from the government of France,[10] and there are numerous other examples on federal parklands throughout the United States. *Ibid.* But regardless of the identity of the original designer or source of the funds or the object, the government's decision to accept ownership or installation of an object—or its assembly of objects—on public parkland for permanent display invariably constitutes an act of speech by the government.[11]

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[7] See National Park Service, *National Capital Parks: A History, Table IV: Statues, Monuments, and Memorials in National Capital Parks* (last modified July 31, 2003) <http://www.nps.gov/history/history/online_books/nace/adhia4.htm>.

[8] Joint Resolution of July 1, 1980, Pub. L. No. 96-297, 94 Stat. 827.

[9] Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, § 508, 110 Stat. 4157.

[10] See Resolution No. 6, 44th Cong., 2d Sess., 19 Stat. 410 (March 3, 1877) (accepting donation). The Statue's pedestal was financed by private donations. See National Park Service, *Statue of Liberty: History and Culture* (last modified Oct. 5, 2006) <http://www.nps.gov/stli/historyculture/ index.htm>.

[11] A governmental entity could establish a policy under which any private party that wished to do so could construct permanent displays

In a previous decision on which the panel relied, see Pet. App. 3a n.2, the Tenth Circuit reasoned that a Ten Commandments monument that had been placed on the lawn outside a different city's municipal building remained the private speech of the Eagles in part because the city was "unable to point to any pre-litigation evidence of [its] explicit adoption of the speech of the Ten Commandments Monument." *Summum* v. *City of Ogden*, 297 F.3d 995, 1006 (2000). Chief Judge Tacha made a similar argument in her opinion responding to the dissents from the denial of rehearing en banc, asserting that the Ten Commandments monument in Pioneer Park remains private speech because there is no evidence that the City ever specifically adopted "the message" of the speech contained upon it. Pet. App. 20f; accord Br. in Opp. 14-17, 31-33.

That reasoning is seriously flawed. There is no requirement that a person or entity that generates a new work of speech from parts originally created by others expressly endorse or expressly disavow each of the more particularized messages that may be conveyed by the speech's constituent parts. The fact that a public university speaks "[w]hen [it] determines the content of the education it provides," *Rosenberger*, 515 U.S. at 834, does not require that it specifically endorse or condemn every statement made by a member of its faculty or an

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on a given piece of public property. In that situation, where the government's policy is clearly "to encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, and where the government takes steps to make clear that the views expressed are *not* those of the government, the resulting speech would likely remain that of the private parties rather than the government. The City in this case, however, has not applied any such policy and, instead, the display at issue constitutes government speech.

invited guest. A publication's editors will often publish the works of columnists with whom they disagree as well as those with whom they agree. The curators of a museum may decide to acquire and display a particular piece because it was created by a particular artist or reflects a particular style or period, notwithstanding the fact that they may find its message obscure or even offensive, just as the creator of an exhibit about the Holocaust may choose to include a piece of Nazi propaganda without endorsing its abhorrent views. But in all of those cases—and in this one—the act of assembling and then displaying or publishing the larger work remains a distinct act of speech by the compiler.

The startling doctrinal and practical consequences of the court of appeals' view that the monuments and other objects on permanent display in Pioneer Park remain solely the speech of their donors underscores how far the court departed from existing jurisprudence. Cf. *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965) (stating that "startling innovation[s] * * * should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent"). As explained in more detail below, see pp. 23-24, *infra*, such a conclusion would, at minimum, require the City to refrain from discriminating based on viewpoint in deciding what objects to display. Although that standard is satisfied on the record here, see pp. 28-32, *infra*, its adoption would still be highly problematic for at least two reasons.

First, even a simple prohibition on viewpoint discrimination could have untenable practical consequences. The installation of a privately donated monument honoring those who died in a particular armed conflict waged on behalf of our Nation—of which there are thousands

on federal parklands alone, see App., *infra*, 1a-11a—could require the government to permit the installation of a monument suggesting that the cause in which those particular individuals died was unjust. The decision to accept and display a donated statue honoring a general who fought for the Union in the Civil War—of which there are at least three in Washington, D.C., alone, see *Ibid.*—could require the government likewise to accept and display a privately funded statue honoring a general who fought for the Confederacy. But see *People for the Ethical Treatment of Animals* v. *Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005) (stating that "[i]f the authorities place a stat[ue] of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee").

Second, even if most claims alleging viewpoint discrimination would ultimately fail, the threat of disruptive and time-consuming litigation would predictably deter many government entities from accepting and displaying privately donated objects in the first place. As in *Forbes*, "[t]hese concerns are more than speculative." 523 U.S. at 681. The United States Army, for example, has already delayed deciding whether to accept a privately designed and funded monument honoring 41 American servicemembers killed in a 1943 crash of a B-17 Flying Fortress for permanent display pending the resolution of this litigation.[12] As this Court has recognized, First Amendment values are not well-served by

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[12] See Letter from Keith E. Eastin, Assistant Sec'y, Installation and Env't, Dep't of the Army, to the Hon. Ike Skelton, Chairman, House Comm. on Armed Servs. (Apr. 29, 2008) (App., *infra*, 12a-13a); Trish Choate, *Memorial Delay Disappoints Veterans Group* (May 1, 2008) <http://www.reporternews.com/news/2008/may/01/memorial-delay-disappoints-veterans-group/>.

doctrines that "result in less speech, not more." *Id.* at 680; accord *United States* v. *American Library Ass'n*, 539 U.S. 194, 208 (2003) (plurality opinion); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983).

Nor will applying the government speech doctrine in this context have any bearing on rules applicable in a true First Amendment forum. Traditional public forum status, and the rules that apply in one, are determined by reference to history and tradition. See p. 23, *infra*. In *Forbes*, this Court recognized candidate debates as a "narrow exception" to its conclusion that "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine," based on a functional assessment of the "design" and "very purpose" of such events. 523 U.S. at 675. And in *Rosenberger*, the Court held that a public university had created a limited public forum with respect to the allocation of certain university funds because the university had "declare[d] that the student groups eligible for [its] support [were] not the University's agents, [were] not subject to its control, and [were] not its responsibility," 515 U.S. at 834-835. There is nothing remotely comparable in the government's selection of monuments for permanent display on the government's own property.[13]

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[13] In a variety of contexts, the Court has concluded that the nature of certain government decisions about what examples of private speech to fund or otherwise make available to the public renders any sort of forum analysis inappropriate. See *American Library Ass'n*, 539 U.S. at 205 (plurality opinion) (collection decisions by public libraries); *Finley*, 524 U.S. at 585 (award of government arts grants); *Forbes*, 523 U.S. at 673 (access to public television broadcasts outside the context of candidate debates). Accordingly, even if the Court were to conclude that the selection of privately donated objects for permanent display in a public park does not represent a distinct act of government speech,

For the reasons stated above, the Court should hold that the City engaged in government speech in accepting and displaying on a permanent basis certain privately donated monuments and other objects in Pioneer Park (and in deciding which objects not to accept or display). Accordingly, because the government "is entitled to say what it wishes," *Rosenberger*, 515 U.S. at 833, "to ensure that its message is neither garbled nor distorted," *ibid.*, and, like any other speaker, to decide "what not to say," *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 16 (1986) (plurality opinion), respondent's assertion that it has a constitutional right to erect its own monument in the Park fails as a matter of law.

B. Even If The Objects Currently On Permanent Display In Pioneer Park Constituted Private Speech, Respondent's Free Speech Claim Would Still Fail As A Matter Of Law

Even if some or all of the objects currently on display in Pioneer Park constituted the private speech of their original donors, respondent's free speech claim would still fail. Contrary to the court of appeals' conclusion, the Park is neither a traditional nor a designated public forum with respect to the permanent installation of privately donated objects. Rather, at most, the Park is a nonpublic forum. Accordingly, respondent's First Amendment claim cannot succeed so long as the City's criteria for permitting such displays are reasonable and

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the scarcity of physical space, the need for delicate judgments about whether the permanent installation of a given object is appropriate for a particular setting, and the incongruity of requiring a property owner to accept ownership of or serve as permanent bailee for an object it does not want, will generally preclude a finding that even a public park is any sort of forum for that kind of private speech.

viewpoint neutral. Because respondent has failed to rebut the presumption that City officials acted in good faith in rejecting its proposed monument, the court of appeals erred in directing entry of a preliminary injunction.

1. A private speaker's right to access government property for speech purposes depends on whether the government has created a forum for speech, and if so, what type of forum. "Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.'" *Forbes*, 523 U.S. at 677 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45). The Court has held that "[t]he government can exclude a speaker from a traditional public forum 'only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.'" *Ibid.* (quoting *Cornelius* v. *NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

"Designated public fora, in contrast, are created by purposeful government action." *Forbes*, 523 U.S. at 677. "The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Ibid.* (quoting *Cornelius*, 473 U.S. at 802). "If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Id.* at 677.

"Other government properties are either nonpublic fora or not fora at all." *Forbes*, 523 U.S. at 677. In a non-public forum, "[t]he government can restrict access * * * 'as long as the restrictions are reasonable and

[are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id.* at 677-678 (quoting *Cornelius*, 473 U.S. at 800); see *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 106-107 (2001) (describing what the Court has often described as a nonpublic forum as "a limited public forum").

2. Like virtually all public parks, see note 11, *supra*, Pioneer Park is neither a traditional nor a designated public forum with respect to the permanent display of privately donated objects. Contrary to the court of appeals' conclusion, see Pet. App. 12a, a court must consider the type of access sought both in defining the scope *and* in determining the nature of the relevant forum. In *Perry Educational Ass'n*, for example, this Court defined the relevant forum as the ability to send messages through "school mail facilities," 460 U.S. at 46, and then analyzed whether *that* discrete forum—rather than the entire school or even the ability to post items on bulletin boards that may also have been located in the schools' mailrooms—was public or nonpublic in nature, *id.* at 46-49. And in *Cornelius*, the Court defined the relevant forum as the ability to participate in the Combined Federal Campaign (CFC), see 473 U.S. at 800-801, and then inquired whether "the CFC"— rather than the tangible physical property on which it occurs or the federal workplace as a whole—was "nonpublic or public in nature," *id.* at 802; see also *Members of the City Council of L.A.* v. *Vincent*, 466 U.S. 789, 814-815 (1984) (framing inquiry as whether public utility poles constitute traditional public fora rather than asking whether the real property on which a given pole stands constitutes such a forum). Likewise, the relevant question here is whether Pioneer Park is a traditional or designated pub-

lic forum with respect to the permanent display of privately donated objects.[14]

The answer is no. Traditional public fora are spaces that "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939). "[I]mplant[ing] a physical structure * * * on public property," though certainly a communicative act, is a far cry from the more dynamic and transitory purposes for which traditional public fora have historically been used, such as "speaking, parading, handbilling, waving a flag, or carrying a banner." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 803-804 (1995) (Stevens, J., dissenting). There is no tradition, much less a "long tradition" (*Perry Educ.*

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[14] There is no conflict between this approach and *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S. 753 (1995), or *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993). See Pet. App. 19f (Tacha, C.J., responding to dissent from denial of rehearing en banc). The only question before the Court in *Pinette* was "whether a State violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government." 515 U.S. at 757. Because the issue was not before it, the Court did not revisit the lower courts' conclusion that the property in question was a traditional public forum with respect to unattended displays, much less decide whether it would properly have been classified as a traditional public forum with respect to the permanent display of privately donated objects. See *id.* at 761. And in *Discovery Network*, the Court did not apply forum analysis at all; rather, the issues involved the proper application of the special standards for regulating commercial speech, see 507 U.S. at 416-428, and whether the City of Cincinnati's ban on the permanent installation of certain newsracks on City sidewalks constituted a valid time, place, or manner restriction, see *id.* at 428-431.

Ass'n, 460 U.S. at 37) of permitting private parties to erect permanent displays of their own choosing on public property—even in public parks. See Pet. App. 6f (Lucero, J., dissenting from denial of rehearing en banc) ("one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments"). Because the Court has cautioned that "[t]he doctrines surrounding traditional public forums may not be extended to situations where such history is lacking," *American Library Ass'n*, 539 U.S. at 206 (plurality opinion); accord *Forbes*, 523 U.S. at 678, Pioneer Park cannot properly be labeled a traditional public forum with respect to the permanent installation and display of such objects.

Nor has Pioneer Park become a designated public forum with respect to the permanent display of privately donated objects. Even if some of the privately donated items currently on display remained the private speech of their donors, "[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Forbes*, 523 U.S. at 679; accord *Perry Educ. Ass'n*, 460 U.S. at 47 (concluding that a school district's internal mail system was not a designated public forum simply because the district had allowed "some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use" it).

The City has not made Pioneer Park "generally available" (*Widmar* v. *Vincent*, 454 U.S. 263, 264 (1981)) for permanent private displays, or permitted their "indiscriminate" installation (*Perry Educ. Ass'n*, 460 U.S. at 37). Every proposed display requires the specific approval of the City Council. See Pet. App. 2h; accord

Forbes, 523 U.S. at 679 (stating that there is no designated public forum when otherwise eligible speakers must "as individuals obtain permission to use it" (internal quotation marks and citation omitted)); *Cornelius*, 473 U.S. at 804 (noting that the government "require[d] agencies seeking admission [to the CFC] to obtain permission from federal and local Campaign officials"). Nor is there any "evidence suggesting that the granting of the requisite permission is merely ministerial," *ibid.*; in fact, the record shows that only approximately a dozen such objects have been installed in Pioneer Park over the course of six decades. See pp. 2-3, *supra*. Finally, when it has granted permission to install permanent displays in Pioneer Park, the City has not acted "to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. Rather, the City has chosen to accept and display only objects that, in its judgment, are related to the City's pioneer heritage or are offered by a person or group with strong ties to the local community, see J.A. 61-62, 102-104; Pet. App. 1h-4h, and the 2004 resolution makes clear that the City Counsel is not required to accept *any* object for permanent display in the Park. See Pet. App. 4h (stating that the City Council "shall make the final determination as to whether [an] item shall be accepted and where the item shall be placed," and may "evaluate the aesthetics of the proposed placement, the effect said placement will have on the remaining open space on the public property, * * * and any other visual or practical effects of locating the item on the proposed site").

The consequences of declaring that public parks are traditional public fora even with respect to the permanent installation of private monuments—or that a governmental entity creates a generally available desig-

nated public forum by accepting one or more privately donated objects for such display—would be staggering. The federal government alone currently displays an unknown number, but certainly well over a thousand, privately donated statues and other memorials on federal parklands. See App., *infra*, 1a-11a. Under the court of appeals' view, it is difficult to see why a governmental entity would have any choices other than banning all permanent monuments (on the theory that doing so would be a permissible "time, place, or manner" restriction on expression in the park generally) or refraining from making any distinctions based on the status of the donors or the content of any privately donated objects it accepts for permanent display. See Pet. App. 14a n.6 (explaining that, under this Court's decisions, "exclusions based on the speaker's identity trigger strict scrutiny when the forum at issue is public"). Were that so, "[a] city that accepted the donation of a statue honoring a local hero could be forced" not only to accept a monument asserting that the same person was actually a villain, but also "to allow a local religious society to erect a Ten Commandments monument—or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag." *Id.* at 11f (McConnell, J., dissenting from the denial of rehearing en banc); see Cities Cert. Amicus Br. 2-3 (explaining that Reverend Fred Phelps has demanded the right to install a so-called "Matthew Shephard Monument" in a city park in Casper, Wyoming, on the ground the park contains a privately donated Ten Commandments monument).

3. For the foregoing reasons, Pioneer Park—if conceivably a forum at all with respect to the permanent installation of monuments, memorials, and other objects, see note 13, *supra*—could be at most a nonpublic forum

with respect to such objects. Accordingly, the court of appeals could not properly direct entry of a preliminary injunction unless respondent has shown that it is likely to prevail on a claim that the City's criteria for selecting objects for permanent display are unreasonable or that its rejection of respondent's proposed monument was based on the viewpoint or viewpoints that such a monument would express. The record in this case does not support such a conclusion.

Control over access to a nonpublic forum may be based on "subject matter and speaker identity" so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Perry Educ. Ass'n*, 460 U.S. at 49. "The [g]overnment's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. Given the limited space in Pioneer Park and the commemorative purposes of the objects currently on display there, it was entirely reasonable for the City to limit access for further permanent displays to objects that relate directly to the history of the community or are donated by organizations and individuals with strong community ties. Pet. App. 2h-3h. Cf. 32 C.F.R. 553.22(j)(1) (providing that the United States Army will accept private donations of "[t]ributes" for display in Arlington National Cemetery only from qualifying veterans' organizations). And respondent makes no assertion—and certainly made none at the time it requested approval to erect its monument in Pioneer Park—that its proposed Seven Aphorisms monument would relate to the history of Pleasant Grove City or that it has any relationship with the local community.

The current record likewise cannot support a conclusion that respondent is likely to prevail on a claim that the City's denial of its requests was based on the viewpoints that would be expressed by its proposed monument. To begin with, none of the three letters from respondent's president to the City contained sufficient information to permit a reasonable person to have any idea what viewpoints would or would not be conveyed. See J.A. 57-60, 63-64. The November 2003 letter denying respondent's initial request stated that the City's policy is to limit permanent displays to those that "either (1) directly relate to the history of Pleasant Grove, or (2) [are] donated by groups with long-standing ties to the Pleasant Grove community," J.A. 61, and the only other evidence in the record states that that has been the City's policy for many years, J.A. 104. Respondent has produced no affirmative evidence that the reasons given were pretextual, and government officials are presumed to have acted in good faith absent a showing to the contrary. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306, 329 (2003).

Respondent's claim is not really that its proposed monument satisfies the criteria set forth in the City's November 2003 letter and the 2004 resolution. Rather, respondent appears to assert that the City must have engaged in viewpoint discrimination because (it claims) some of the items currently on display in Pioneer Park do not satisfy the City's publicly announced criteria either. Respondent has made that claim most frequently with regard to the Ten Commandments monument that was donated by the Eagles in 1971, see Br. in Opp. 4-5; J.A. 15-16, 144-146; Resp. C.A. Br. 21-22, but it has made the same suggestion about the September 11 monument as well, see *ibid.*

Respondent's contention is flawed, however, for at least two different reasons. First, the criteria themselves call for an exercise of judgment by the City Council, see Pet. App. 1h-4h, and the record contains explanations by responsible City officials why the various items currently on permanent display *do* satisfy the City's publicly announced standards. J.A. 100, 140-141, 144, 146, 188, 196-197. Respondent may disagree with those explanations, but the decision is not respondent's to make, and the record does not support a finding that the City's explanations are pretextual.

Second, even if respondent could somehow demonstrate that, under the terms of its own policy, the City Council clearly made a mistake when it accepted the Ten Commandments monument from the Eagles in 1971, that still would not demonstrate that the City Council engaged in viewpoint discrimination when it rejected respondent's 2003 and 2005 requests to install its own permanent monument. A conclusion that the 1971 decision automatically *mandated* the acceptance of respondent's proposed monument would amount to a holding that the scope of a government-created forum can be expanded by inadvertence or mistake. Moreover, there is a basic difference between declining an offer for a new object from an entity that has no discernable connection to the local community and unearthing and spiriting away from its longstanding place in public view a gift that was received more than three decades ago by an entity that has made repeated and meaningful civic contributions during the intervening years and gives every indication that it will continue to do so in the future. J.A. 94-97, 103. Cf. *Board of Educ.* v. *Pico*, 457 U.S. 853, 878 n.1 (1982) (Blackmun, J., concurring in part and concurring in the judgment) (acknowledging the difference

between removing a book from a school library's collection and deciding not to acquire the book in the first place).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 2008

APPENDIX A

District of Columbia:

(1) Statues of Generals throughout D.C. Several of these statues, including those of General James B. McPherson in McPherson Square (1876) and General George H. Thomas in Thomas Circle (1879), were given by private associations, with Congress sometimes providing financial support for the statue's erection or pedestal. A statue of General George S. Meade was donated by the State of Pennsylvania in 1927, and the President and Fellows of Harvard College donated a statue of General Artemas Ward in 1938. National Park Service, *Sculpture in the Parks of the Nation's Capital* 30-31, 46-47, 48-49 (March 1985) (*Sculpture in the Parks*).

(2) Peace Monument (Naval) (1877). Paid for partially by Congress, but mainly by subscriptions from Naval personnel. *Sculpture in the Parks* 36-37.

(3) Statue of President Abraham Lincoln in Lincoln Park (1876). Erected on public grounds by the emancipated citizens of the United States. Congress approved the installation and provided funds for a pedestal. *Sculpture in the Parks* 26-27.

(4) Washington Monument (1885). 192 carved stones inserted into the monument's interior walls were presented by individuals, societies, cities, states, and nations of the world.

<http://www.nps.gov/history/nr/travel/wash/dc72.htm>. A large portion of the monument itself was also paid for by popular subscription. See George J. Olszewski, A History of the Washington Monument (1971).

(5) Statue of President James Garfield at First Street and Maryland Avenue (1887). Congress appropriated a portion of the funds, with the rest subscribed by the Army of the Cumberland. *Sculpture in the Parks* 16-17; <http://www.nps.gov/history/history/online_books/nace/adhia4.htm>(item 13).

(6) Statue and memorial columns in Battleground National Cemetery. Between 1864 and 1914, three different States paid to erect three columns and a statue in honor of persons killed or wounded during, or who took part in, the defense of Washington, D.C. in 1864. *Sculpture in the Parks* 32-33.

(7) Statues of American figures throughout D.C. Many of the statues of prominent Americans on public lands in D.C. were given to the United States by private groups or individuals, with Congress sometimes providing financial support for the foundation. Among them, the Photographic Association of America gave a bust of L.J.M. Daguerre (1897); the Physicians and Surgeons of the United States gave a statue of Dr. Samuel D. Gross (1897); Stilson Hutchins gave a statue of Daniel Webster (1900); the American Homeopathy Association gave a

statue of Dr. Samuel Hahneman (1900); the Knights of Columbus gave a statue of James Cardinal Gibbons (1932); the American Federation of Labor gave a statue of Samuel Gompers (1933); and the Longfellow Memorial Association (1909), the Witherspoon Memorial Association (1909), the Francis Ashbury Memorial Association (1924), and the William Jennings Bryan Association (1924) each gave a statue of its respective namesake. *Sculpture in the Parks* 6-7, 16-17, 18-19, 28-29, 50-51; <http://www.nps.gov/history/history/online_books/nace/adhia4.htm> (items 17, 30, 68).

(8) Stephenson Grand Army Memorial (1909). Given by the Stephenson Grand Army Memorial Association, with Congress funding the pedestal. <http://www.nps.gov/history/history/online_books/nace/adhia4.htm> (item 32).

(9) Statues of non-American historical figures. Washington, D.C. also includes a number of statues of non-American historical figures that have been donated to the United States and are displayed on national parklands, with Congress sometimes providing funding to prepare the site. These include a statue of Polish general Thaddeus Kosciusko given by the Polish American Alliance and Polish-American citizens (1910); a statue of Edmund Burke given by the Sulgrave Institution of Great Britain and America (1922); a statue of Argentinian general José de San Martín (1925); a statue of Italian telegraph inventor Guglielmo Marconi (1941); a sta-

tue of the Uruguayan general Jose Artigas given by the school children of the Republic of Uruguay (1950); and a statue of Mahatma Gandhi (2000). *Sculpture in the Parks* 6-7, 24-25, 28-29, 40-41; <http://www.nps. gov/history/ history/online_books/nace/adhia4.htm> (item 45); <http://www.indianembassy.org/newsite/gandhimemorial.asp>.

(10) Tidal Basin Cherry Blossom Trees (1912). These trees were donated as a gift of friendship to the United States from the people of Japan. <http://www.nps.gov/nama/planyourvisit/cherry-blossom-history.htm>.

(11) DuPont Memorial Fountain in Dupont Circle (1921). The fountain was paid for entirely by members of the family of Admiral Samuel Francis DuPont. *Sculpture in the Parks* 12-15.

(12) Statues in Meridian Hill Park. A statue of Dante was given to the United States by Carlo Barsotti in the name of Italian-Americans in New York in 1921; a statue of Joan of Arc was given by the Societe des Femmes de France a New York in 1922; the statue "Serenity" was given by Charles Dearing in 1924; and a statue of President James Buchanan was given by the estate of Harriet Lane Johnston in 1931. All were erected pursuant to public resolutions by Congress. *Sculpture in the Parks* 10-11, 22-23, 41-42; <http://www.nps.gov/history/ history/online_books/nace/adhia4.htm> (item 58).

(13) The Zero Milestone (1923). This granite shaft on the Ellipse was paid for by the Lee Highway Association to commemorate the starting point of a 1919 motor convoy to San Francisco. *Sculpture in the Parks* 50-51.

(14) Joseph J. Darlington Memorial Fountain in Judiciary Square (1923). Presented as a gift to the City of Washington without expense to the United States. *Sculpture in the Parks* 10-11.

(15) Nuns of the Battlefield Monument (1924). Erected by the Ladies' Auxiliary of the Ancient Order of the Hibernians. *Sculpture in the Parks* 34-35.

(16) First Division Memorial (1924). Erected by the Memorial Association of the First Division of the United States Army without expense to the United States. *Sculpture in the Parks* 14-17.

(17) Cuban Friendship Urn (1928). This monumental urn was presented as a gift to President Calvin Coolidge by the president of Cuba and accepted pursuant to a joint resolution of Congress. *Sculpture in the Parks* 10-11.

(18) Titanic Memorial (1931). Erected by the Women's Titanic Memorial Association without expense to the United States. *Sculpture in the Parks* 46-47.

(19) D.C. World War Memorial (1931). This circular marble temple was erected by the District of

Columbia Memorial Commission without expense to the United States. *Sculpture in the Parks* 12-13.

(20) Original Patentees of the District of Columbia (1936). This granite shaft on the Ellipse was given by the National Society of the Daughters of the American Colonists without expense to the United States. *Sculpture in the Parks* 36-37.

(21) Second Division Memorial (1936). This flaming sword of gold leaf was erected by the Second Division Association as a memorial to its dead without expense to the United States. *Sculpture in the Parks* 42-43.

(22) Arlington Memorial Bridge Equestrian Statues (1951). These four giant statues representing the arts of War and arts of Peace were given to the American people by the people of Italy. *Sculpture in the Parks* 4-5.

(23) Boy Scout Memorial (1964). Boy Scout troops throughout the United States raised the funds to pay for this memorial that sits on the Ellipse. The monument was accepted on behalf of the Nation by Associate Justice Tom Clark, an Eagle Scout. <http://www.nps.gov/whho/planyourvisit/explore-the-southern-trail.htm#CP_JUMP_100807>.

(24) Vietnam Veterans Memorial (1982). Authorized by Joint Resolution of July 1, 1980, Pub. L. No.

96-297, 94 Stat. 827, which provided that neither the United States nor the District of Columbia shall be put to any expense in the memorial's establishment.

(25) National Law Enforcement Officers Memorial (1991). The private, nonprofit National Law Enforcement Officers Memorial Fund established this Judiciary Square monument to law enforcement officers killed in the line of duty. <http://www.nps.gov/archive/nero/PublicAffairs/ProposedMemorials.htm>.

(26) National Japanese American Memorial to Patriotism (2000). Joint Resolution of October 24, 1992, Pub. L. No. 102-502, 106 Stat. 3273, authorized the Go For Broke National Veterans Association Foundation to establish a memorial to honor Japanese American patriotism in World War II on Federal land without expense to the United States. <http://njamf.com/home/>.

(27) National World War II Memorial (2004). The memorial was funded almost entirely by private contributions. Individuals, corporations, states, school children, veterans groups, and civic organizations contributed more than $197 million for the memorial's construction and ongoing maintenance. <http://www.wwiimemorial.com/default.asp?page=funding.asp&subpage=intro>.

(28) Collections at the National Gallery of Art. In addition to the Gallery's original body of paintings and sculpture that were given by Andrew Mellon, collectors such as Samuel H. Kress, Rush H. Kress, Joseph Widener, Chester Dale, Bernice Chrysler Garbisch, and hundreds of others have donated pieces to the collection. <http://www.nga.gov/ginfo/aboutnga.shtm>.

(29) Collections at the Library of Congress. The Library's collection contains many individual gifts to the United States, including an 1869 gift of books from the emperor of China, five Stradivari violins, two drafts of the Gettysburg Address, and many personal libraries of notable Americans and collectors. <http://www.loc.gov/loc/legacy/colls.html>.

(30) Collections at the Smithsonian Institute. The Hope Diamond was donated by Harry Winston Inc. <http:// mineralsciences.si.edu/hope.htm>. Charles Lindbergh donated his plane, "The Spirit of St. Louis." <http://collections.nasm.si.edu/code/emuseum.asp?profile=objects&quicksearch=A19280021000&newstyle=single>. The Star Spangled Banner was a gift to the Institute from a Baltimore family. <http://americanhistory.si.edu/ssb/6_thestory/fs6.html>.

Georgia: Fort Benning National Infantry Museum. The grounds of Fort Benning's National Infantry Museum contain several monuments to specific infantry divisions that were donated by veterans. There are also at least two monuments that were given by soldiers to memorial-

ize a dog of which the troops had grown fond. <https://www.benning.army.mil/museum/outside_tour/monuments/index.htm>.

Hawaii: Brothers in Valor Memorial. This monument honoring Japanese-American military contributions in World War II was initiated by a university professor and paid for by veterans and the city of Honolulu. It is located on the federal military base of Fort DeRussy. See Gregg K. Kakesako, *A Gathering of Warriors*, Honolulu Star-Bulletin (July 3, 1998) <http://starbulletin.com/98/07/03/news/story1.html>.

Maryland: Antietam National Battlefield. There are 96 monuments at Antietam, most of which were erected by veterans groups. These include monuments to states, individuals, regiments, and even war correspondents. Originally administered by the War Department, the battlefield was transferred to the National Park Service in 1933. <http://www.nps.gov/anti/historyculture/monuments.htm>.

Mississippi: Vicksburg National Military Park. The park contains one of the largest collections of outdoor art in the southeastern United States, with 1,324 monuments, markers, tablets, and plaques created by the most renowned American sculptors of the period. <http://www.nps.gov/archive/vick/visctr/sitebltn/artists/v_artist_lst.htm>. The legislation that established the park gave states, organizations, and individuals the ability to erect monuments, upon approval by the Secretary of War, see An Act to establish a national military park to commemorate the campaign, siege, and defense of Vicksburg, 55th Cong., sess. III, ch. 176, 30 Stat. 841 (1899), and all but one of the 1,324 objects on display were so donated.

New York: Statue of Liberty. Presented to the United States as a gift from the citizens of France, the monument sits entirely on federal land. It was transferred from the War Department to the National Park Service in 1933. <http://www.nps.gov/stli/historyculture/index.htm>.

Pennsylvania:

(1) Gettysburg National Military Park. With more than 1,300 monuments, the Gettysburg battlefield contains the largest collection of outdoor sculpture in the world. Several hundred of the monuments and memorials were donated by veterans groups from both the Union and Confederacy. <http://www.nps.gov/gett/parknews/stone-soldiers.htm>.

(2) POW/MIA Memorial at Tobyhanna Army Depot. The Tobyhanna Veterans Council raised funds to design and build this memorial at this Department of Defense maintenance facility in Coolbaugh, Pennsylvania. <http://www.tobyhanna.army.mil/about/news/POW%20MIA%202.html>.

Tennessee: Shiloh National Military Park. The battlefield includes more than 100 monuments that were given to the national park by states, veterans units, and the Daughters of the Confederacy. <http://www.nps.gov/archive/shil/admhiswar14.htm>.

Virginia:

(1) U.S. Marine Corps Memorial (Iwo Jima Memorial). This monument to the U.S. Marine Corps

was paid for entirely by Marines, former Marines, Marine Corps Reservists, friends of the Marine Corps, and members of the Naval Service. <http://www.nps.gov/archive/gwmp/usmc.htm>.

(2) Monuments at Arlington National Cemetery. Many of the monuments at Arlington were privately donated, including the Confederate Memorial, erected by the Daughters of the Confederacy; the Pan Am Flight 103 Memorial Cairn, given by the people of Scotland; the monument to Admiral Richard Evelyn Byrd, given by the National Geographic Society; and the Spanish-American War Monument, erected by the National Society of Colonial Dames. <http://www.arlingtoncemetery.org/visitor_information/monuments.html>.

(3) The newly-built Marine Corps National Museum in Quantico, Virginia is surrounded by a park that the museum intends to fill with monuments donated by organizations that wish to honor units and fallen comrades. Marine Corps Heritage Foundation, *Sentinel Annual Report* 4 (2005) <http://www.marineheritage.org/Sentinel_Annual2005.pdf>.

Washington: Arrowhead Soldier Monument at Fort Lewis. The nonprofit Arrowhead Soldier and Family Fund erected this memorial to soldiers who died in Iraq. Christian Hill, *Memorial to Stryker Dead Unveiled*, The Olympian (Oct. 11, 2007).

APPENDIX B

[Seal Omitted]

DEPARTMENT OF THE ARMY
ASSISTANT SECRETARY
INSTALLATIONS AND ENVIRONMENT
110 ARMY PENTAGON
WASHINGTON DC 20310-0110

[Apr. 29, 2008]

The Honorable Ike Skelton
Chairman
House Committee on Armed Services
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter serves as the second interim reply to the Congressionally-directed reporting requirement (Section 1051 of Public Law 110-81) on the possible locations outside of Arlington National Cemetery that would serve as a suitable location for the Bakers Creek Memorial. At this time, the Army has agreed to delay any decision regarding the siting of Bakers Creek Memorial for the following reasons.

On March 31, 2008, the United States Supreme Court granted a petition for a writ of certiorari in the case of *Summum v. Pleasant Grove City,* 483 F.3d 1044 (rehearing denied, 499 F.3d 1170 (10th Cir. 2007). In this case, the lower court ruled that, once a city accepts and

permanently displays a monument donated by a private party, the city creates a public forum and is required to accept other monuments donated by private parties for permanent display. Due to the ramifications that this case may have on the Army's acceptance of Bakers Creek Memorial or any other monument funded by private funds, the Army will await the Supreme Court's decision to assess its options.

Let me assure you that, upon resolution of the Supreme Court case, the Army will proceed quickly and accordingly. Further, the Army will ensure that all Congressional concerns are addressed to the best of our abilities. If you require additional information, please feel free to contact me.

Sincerely,

KEITH E. EASTIN

KEITH E. EASTIN

cc: The Honorable Duncan Hunter
Ranking Member

AMICUS CURIAE BRIEF

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FILED

JUN 23 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-665

IN THE
Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL.,

Petitioners,

vs.

SUMMUM, a corporate and sole church,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

Brief of Amici Curiae, Alliance Defense Fund and Family Research Council, Supporting Petitioners

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INTEREST OF AMICI IN THIS CASE[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. ADF and its allied organizations represent hundreds of thousands of Americans who have a right to religious expression in public forums. Its allies include more than 1,100 attorneys and numerous public interest law firms. ADF has advocated for the rights of Americans under the First Amendment in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 1,000 cases and legal matters, including cases before this Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Troxel v. Granville*, 530 U.S. 57 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

FAMILY RESEARCH COUNCIL is a nonprofit research and educational corporation headquartered in Washington, D.C. It exists to affirm and promote the traditional family and the Judeo-Christian principles upon which this country is built. Family Research Council provides resources and guidance for citizens concerned about national policy as it relates to cultural morality.

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[1] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. No portion of this brief was authored by counsel for a party, and no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioners have identified several glaring errors in the constitutional analysis of the court below. If not reversed, Amici are particularly concerned that at least two of those errors could have far-reaching, negative implications.

First, the court's mistaken classification of the monument displays of Pleasant Grove City as private rather than government speech sets forth an "equal access"/"all-or-nothing" rule for donated public monuments that could jeopardize the integrity and survival of war memorials and other historic markers throughout the Tenth Circuit and beyond, and erode the government's ability to choose and express its preferred messages on public land. Second, the Tenth Circuit's use of a flawed forum analysis sets a precedent that will confuse future cases. The court incorrectly determined that a forum for private speech was created here, and then fumbled its forum review by emphasizing the *physical property* of the park at issue, rather than the *access being sought* by the Respondent.

The scope of this brief is limited to three important points regarding public fora: 1) When a private party donates an historical monument to the government, mere acceptance of that item does not–and for practical purposes cannot–create a public forum for private speech. 2) A forum for public display of private monuments *can* be created, but only by intentional and purposeful government action. 3) Once a forum *is* created, the government cannot manipulate it to exclude religious speech.

Two judges who urged en banc review of this case described the panel's decision as "incorrect as a matter

of doctrine and troublesome as a matter of practice."[2] Amici agree and thus join Petitioners in urging the Court to reverse the decision below.

ARGUMENT

In this case, the only party engaging in speech was the government of Pleasant Grove City. Petitioners have shown that the subject area, the municipality's Pioneer Park, is dedicated to structures, monuments and memorials "that either portray the Mormon pioneer-era heritage of Pleasant Grove, or are contributions of local [longstanding] civic groups, or both." Pet. Brf. at 3, 6. It is a place designated by city policy for historical preservation. *Id.* And it is not unlike other historical sites throughout America, where a local government owns and fully controls all of the items that it selects for public display. Through such displays, the government communicates its chosen messages.

Respondent argued here that Pioneer Park should be open for *his* chosen message, too. He demanded acceptance and display of *his* selected monument on a theory that the park is a traditional public forum, or alternatively, a designated public forum, for such private speech. The Tenth Circuit oversimplified its review of Respondent's claims. Applying the general rule that all city parks are quintessential public fora, the court jumped instinctively into strict scrutiny analysis. Regarding this as a case about government restriction upon private speech, the court held that Pleasant Grove had no right to refuse display of Respondent's monument.

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[2] *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1178 (10th Cir. 2007) (McConnell, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc).

The court of appeals' primary error was failing to see that **no forum for private speech existed** with regard to Pleasant Grove's monuments display. Because the display itself is exclusively a form of government speech, and no other forum for private speech/monuments was intended or created here, the Respondent had no right to impose his display on Pleasant Grove. This Court should reverse the Tenth Circuit's decision.

I. MERE GOVERNMENT ACCEPTANCE OF THE DONATION OF AN HISTORICAL MONUMENT FROM A PRIVATE PARTY DOES NOT CREATE A PUBLIC FORUM FOR PRIVATE SPEECH .

As succinctly stated by two dissenting members of the court below, "[J]ust because [] cities have opted to accept privately financed permanent monuments does not mean they must allow other private groups to install monuments of their own choosing." *Pleasant Grove City*, 499 F.3d at 1177 (McConnell, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc). It is crucial that the dissent's premise be affirmed by this Court. Otherwise, chaotic cluttering of countless public areas could certainly follow.

A. The Tenth Circuit's Public Forum Analysis was Unnecessary, Wrongly Focused, and Led to a Faulty Conclusion.

The panel was confused about which type of speech was at issue. Forum analysis was unnecessary here, because the Petitioners' monuments should have been classified as **government speech**. The court instead mistakenly viewed this as a case about **private speech**

because of the geographical location of the dispute. The court found that Pioneer Park is, like other city parks, a traditional public forum, and logically concluded, "[T]he city cannot close or otherwise limit a traditional public forum by fiat; a traditional public forum is defined by its objective characteristics, not by governmental intent or action." *Summum v. Pleasant Grove City,* 483 F.3d 1044, 1050-51 (10th Cir. 2007) (citations omitted).

That is true, and the grounds of Pioneer Park are indeed traditional public fora. *However*, there are two important reasons why that status should not have determined the outcome of this case.

First, with regard to traditional public fora, the panel below failed to note the obvious point that unattended, free-standing, permanent displays of private parties are not generally permitted in such areas. Judge McConnell's dissent rightly observes: "By tradition and precedent, city parks-as 'traditional public forums'-must be open to speeches, demonstrations, and other forms of transitory expression. But neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties." *Pleasant Grove City,* 499 F.3d at 1175 (McConnell, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc).

This distinction is no impediment to Respondent Summum's First Amendment rights. Like any other citizen, Respondent is always welcome to openly share his views on the grounds at Pioneer Park through personal communication, literature distribution, temporary placards, or a soapbox. He can rove the grounds to proselytize and share his "Seven Aphorisms" as often as he desires. But, unless the local government consents, he has no right to commandeer public

property to *permanently* memorialize his message. No citizen does.

The second, and most important reason, why Pioneer Park's status as a traditional public forum is irrelevant in this case is because *the park's grounds are not the issue*. Assuming *arguendo* that forum analysis was necessary in this case– and Amici maintain it was *not*– the proper forum for that analysis should have been the City's internal selection process for its monument displays, rather than the real estate on which the monuments rest. Forum analysis "focuse[s] on the access sought by the speaker," rather than simply the tangible "government property at issue." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (concluding that a charity fundraising drive and its attendant literature was the relevant forum to be analyzed, instead of the federal workplace in which the fundraising activity was conducted).

By emphasizing the physical property of Pioneer Park rather than the access being sought by the Respondent, the court of appeals got off track. Its misplaced analysis led the court to the erroneous conclusion that Pleasant Grove officials were unlawfully denying the Respondent access to a traditional forum for private speech. However, since there can be no argument that the internal, decision-making process of local government officials is a traditional public forum, the Tenth Circuit's opinion cannot be sustained unless it could be determined that those local officials somehow opened–or designated–a forum for the admission of private speech.

B. A Designated Public Forum Cannot be Created Inadvertently.

The problem for the Respondent here is that there is no such thing as an *accidental* designated public forum. The very idea is oxymoronic. Instead, as this Court explained in *Cornelius,* "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by **intentionally** opening a nontraditional forum for public discourse." *Id.* at 802 (emphasis added).

The Tenth Circuit's previous ruling in *Summum v. City of Ogden,* 297 F.3d 995 (10th Cir. 2002), contradicts this well established principle, but nevertheless served as a basis for the panel's ruling below. The panel implied that even if Pleasant Grove's monuments were not being displayed in a traditional public forum like Pioneer Park, the court's decision would be the same in light of *City of Ogden*. *See Pleasant Grove City,* 483 F.3d at 1048, n.2. Since the Petitioners had years earlier accepted for display a Ten Commandments monument donation from the Fraternal Order of Eagles, the panel suggested that in that moment a public forum for private speech (via permanent monuments) was created by the municipality–even if it was **unintentional**.

The panel was bound by *City of Ogden* and its conclusion that a government's acceptance and display of a donated item always remains the private speech of the donor. *Id.* **Thus, under the Tenth Circuit's rule, the mere acceptance of the donation automatically and unwittingly designates a new forum for private speech.**

If left unchecked, this aberrant reasoning could lead to unsightly clutter and absurd consequences. As noted by the dissent below: "A city that accepted the donation

of a statue honoring a local hero could be forced, under the panel's rulings, to allow a local religious society to erect a Ten Commandments monument-or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag." *Pleasant Grove City*, 499 F.3d at 1175 (McConnell, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc). It may not end there. What would prevent a local chapter of the Skinheads from gaining access for display of their Nazi flag next to the VFW memorial? Could not the local strip club erect in the public park a nearly-obscene statue celebrating sexually oriented businesses? Why not a monument to Al-Qaeda next to the Declaration of Independence replica at city hall?

The right way to prevent such madness is for this Court to reverse the Tenth Circuit and affirm its own logical doctrine regarding the government's accountability for, and responsible control and designation of, public fora.

II. GOVERNMENTS CAN CREATE A FORUM FOR PRIVATE MONUMENTS TO BE DISPLAYED ON PUBLIC PROPERTY, BUT ONLY BY CLEAR POLICY AND PRACTICE.

There is of course no doubt that the government has the *ability* to open a public forum for private, unattended monuments, if it decides to do so. But such a forum cannot be created by accident or mere happenstance. Instead, the designation of a "monument forum" by the government must be deliberate and intentional. In the present case, Pleasant Grove City's officials did just the opposite.

A. A Forum for Private Monuments Can Only Be Created by Purposeful Action.

This Court has acknowledged that governmental bodies can designate specific fora for temporary public display of privately donated items. For instance, in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), the State of Ohio opened its 10-acre statehouse plaza in Columbus for display of private monuments. *Id.* at 757. Importantly, state law specified the property's availability for broad public use and varieties of speech, provided for an official application form, and established content-neutral criteria to obtain the Review and Advisory Board's approval. *Id.* at 757-58. "Capitol Square is a genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years." *Id.* at 766. This status was "publicly announced" and the site was historically "open to all on equal terms." *Id.* at 770. Because free-standing, unattended, private displays were consistently approved and allowed by the Board, and "there was no policy against them," *Id.* at 758 (citing to district court's finding)], the state was required to permit a private party to erect its unattended Latin cross display during the Christmas season. These circumstances are very different than the facts at issue in Pleasant Grove, where no monument forum has ever been opened for public access.

As with temporary displays, a government can similarly open a **permanent** monument display opportunity for private speakers in what is otherwise a non-public forum. But this too can be done only by the government's express intention. Other federal courts have recognized the creation of designated and/or limited public fora in circumstances where local officials

announce a forum and then invite the speech of all interested persons.

For example, in *Kiesinger v. Mexico Academy and Cent. School*, 427 F. Supp. 2d 182 (N.D. N.Y. 2006), the court affirmed that a limited public forum was created when school officials *advertised* and *invited* members of the community to purchase and place private messages on memorial bricks that would be installed in a new front walkway. *Id.* at 191. Since the forum was deliberately opened, "viewpoint discriminatory censorship" of the private speech was prohibited, and bricks "referr[ing] to Jesus and offer[ing] a specific religious viewpoint on God, an otherwise permissible subject," could not be excluded from the forum. *Id.* at 194-95.

The same conclusion was reached in *Demmon v. Loudon County Public Schools*, 342 F. Supp. 2d 474 (E.D. Va. 2004), when a high school fund-raising project sold memorial bricks for the school's "walkway of fame." The circumstances showed that the walkway was clearly a limited or designated public forum for private speech, and thus removal of bricks decorated with Latin crosses, while allowing bricks with secular symbols, amounted to viewpoint discrimination. *Id.* at 482.

The intention of the state actor is ascertained primarily by review of its policy and practice. *Cornelius*, 473 U.S. at 802. For example, in *Widmar v. Vincent*, 454 U.S. 263, 267 (1981), the Court found that a state university's express policy of opening meeting facilities for use of student groups created a public forum. In *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n.*, 429 U.S. 167, 174, n.6 (1976), a state statute provided for open school board meetings, and thus affirmatively created a forum for citizen participation and speech. In *Southeastern Promotions*,

Ltd. v. Conrad, 420 U.S. 546, 555 (1975), a municipal auditorium and theater were specifically designed and expressly dedicated for the public's use and access. Without such purposeful action, no forum is created.

B. No "Monuments Forum" Was Created in This Case.

In contrast to the cases cited above, where public fora were clearly intended and designated, Pleasant Grove's city officials never opened a forum for private expression in its monuments display at Pioneer Park. Instead, that park's display was specifically designed and dedicated to portray the Mormon pioneer-era heritage of the city and historic contributions of longstanding, local civic groups. Pet. Brf. at 3.

Rather than announcing some open invitation for the public display of artwork or memorabilia of any and all parties, the city utilized a careful and deliberate review process for which objects it would select for placement in its park. *Id.* at 4. This review and selection process involved at least three meticulous steps and three different departments of local officials (from the Historical Commission to the park management authority to the city council). *Id.* In 2004, the city codified this long-established practice by adopting a written policy specifying its process and legitimate selection criteria for the monuments display. *Id.* at 6. Importantly, the city has always maintained full ownership and control of each item selected for exhibition. *Id.* at 5.

Nothing here indicates an express intention, a policy, or a practice to create a "monuments forum" for the entry of all citizens. Further, it matters not that this Court has in previous cases sometimes "also examined the nature of the property and its

compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802. Again, this evaluation should have been about the access being sought to the monuments display, rather than the physical grounds of Pioneer Park. Accordingly, the nature of the Mormon pioneer-era heritage/historical display remains limited and specific, and not compatible in any way with the infinite variety of messages and topics that would be required additions in a typical public forum.

There are many logical reasons why this Court's doctrine requires deliberate and purposeful government action to open a public forum in an arena that is otherwise controlled by the government. As summarized by the Petitioners, "accepting a Statue of Liberty does not compel a government to accept a Statue of Tyranny." Pet. Brf. at 2. Unless this Court corrects the Tenth Circuit's error below, that important principle could be in jeopardy.

III. GOVERNMENT OFFICIALS ARE NOT PERMITTED TO MANIPULATE PUBLIC FORA TO EXCLUDE RELIGIOUS SPEECH.

Because confusion with regard to the place of religious speech in public fora is unfortunately so common, Amici aver that the Court's decision herein should include a note of reminder that gerrymandering to exclude private religious expression is unlawful. In traditional public fora, and in other fora that is opened for private speech, government officials are not allowed to treat religious speech as "a First Amendment orphan." *Pinette*, 515 U.S. at 760 (*citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *Widmar*, 454

U.S. 263 (1981); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

In *Pinette,* because the State of Ohio deliberately opened its statehouse plaza as a public forum for display of free-standing, private monuments, the contribution of a Latin cross could not be refused. *Id.*, 515 U.S. at 757, 760. In *Lamb's Chapel,* because a school district maintained a policy of allowing after-hours use of school facilities, its open forum could not be denied to a church group for religious use. *Id.*, 508 U.S. at 393-94. In light of a similar policy allowing community use of school facilities in *Good News Club v. Milford Central Schools*, 533 U.S. 98, 112 (2001), an after-hours Christian club for students could not be excluded from the school building. In *Rosenberger v. Rector & Visitors of the Univ. Of Va.*, 515 U.S. 819, 834 (1995), once the University offered to pay for the outside printing costs of student publications, "on behalf of private speakers who convey their own messages, the University may not silence the expression of selected [Christian editorial] viewpoints."

In short, government exclusion of religious speech from a forum otherwise opened for broad access is not permitted by the First Amendment. In the present case, because there was no forum created, there was no opportunity for such viewpoint discrimination. But this Court's opinion should point out that ***IF*** Pleasant Grove *had* opened a designated forum for private displays in Pioneer Park, city officials could not have excluded the Ten Commandments monument donation, the "Seven Aphorisms" of Respondent Summum, nor any other submission on the basis of religion or religious viewpoint. As this Court has stated, "a free-speech clause without religion would be Hamlet without the prince." *Pinette*, 515 U.S. at 760.

CONCLUSION

In this case, the Tenth Circuit has blurred the clear distinction between government and private speech, and made a mess of its recent public fora analysis. To correct these errors, this Court should reverse the judgment below.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

110 30 JUNE 23,08

No. 07-665

In The

Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, et al.,

Petitioners,

v.

SUMMUM, a corporate sole and church,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CATHOLIC LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The American Catholic Lawyers Association, Inc., ACLA, is a non-profit organization dedicated to securing the rights of Catholics in the United States.

The ACLA's interest in this case is clear. The Catholic Church and other religious communities, through the actions of their members, have made significant contributions in this country and the world in every sphere of human life: philosophy, law, literature, politics, science, and the arts. In recognition of this fact, governmental bodies have frequently accepted donations of sculptures, statues, plaques, monuments, or other physical memorials that capture these achievements for the community's appreciation.

SUMMARY OF THE ARGUMENT

The Tenth Circuit opinion in this case illustrates a paradigm example of a well-known axiom of logic: faulty premise, faulty conclusion.

By injudiciously holding that all private property donated and accepted by the government remains the private speech of donors, the Tenth Circuit was ineluctably led to the mistaken conclusion that public

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[1] As reflected in the record, all parties have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

forum analysis applies when such monuments are placed by the government in public areas. Neither logic nor the Free Speech Clause of the First Amendment supports this decision.

In short, the Tenth Circuit decision unreasonably deprives federal, state, and local governments from highlighting for public reflection important "monumental" achievements or concerns of the community.

ARGUMENT

I. The Tenth Circuit decision that donated property, once accepted and placed by the government on public property, remains the private speech of the donor and, therefore, entails application of "public forum" strict scrutiny analysis contradicts the very notion of a donation, and is contrary to other Circuits' interpretation of the Free Speech Clause.

A. The Tenth Circuit Decision that donated property remains private speech after being accepted by the government conflicts with the basic conception of a "donation" and relevant Supreme Court precedent.

In the present case it is undisputed that the monuments at issue in Pioneer Park (the "Park"), Pleasant Grove, Utah are the property of the City of Pleasant Grove ("Pleasant Grove"). Further, it is uncontested that the Ten Commandment monument

and other monuments located in the Park were "donated" by private parties and "accepted" by Pleasant Grove. All agree that the donated monuments are the property of and belong to Pleasant Grove.

Nevertheless, Respondent Summum ("Summum") argues, and the Tenth Circuit agreed, that even after that property became the public property of Pleasant Grove, it remained the "private speech" of the donor rather than the speech of the government.

Summum's contention, apart from other substantial arguments against it, rests upon an implausible departure from the common law understanding of "donation" and "acceptance". As the most basic blackletter law provides, a completed, absolute donation or gift of property from one party to another transfers to the donee complete ownership and possession of all interest in the transferred property. (See, e.g., 38 Am. Jur. 2d Gifts § 68 "A completely executed gift . . . operates . . . as a full and complete transfer of the title to the property from the donor to the donee. . . . When a gift occurs, ownership vests in the donee immediately and is absolute.")

This point is not irrelevant to issues raised in the present case. In ruling in favor of Summum, the Tenth Circuit, citing its prior holding in *Summum v. City of Ogden*, 297 F.3d 995, 1006 (10th Cir. 2002) concluded that a Ten Commandment monument donated and placed by the city on public property was private speech rather than that of the city." *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048, footnote 2 (10th Cir. 2007). In so doing, the court of appeals rejected Pleasant Grove's argument that the Ten

Commandment monument was government speech rather than private speech. *Id.*

Pleasant Grove had relied in support of this argument on *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005), where this Court found that the government had not violated the Establishment Clause in connection with the display of a donated permanent Ten Commandment monument on government property. Pleasant Grove argued that this Court would not have even considered the Establishment Clause claim in *Van Orden* unless it believed that such monuments were government speech.

The Tenth Circuit, however, rejected Pleasant Grove's reliance on *Van Orden* by pointing to discussion of whether Establishment Clause "endorsement" claims always depended upon the existence of "government speech." Based on Justice O'Connor's concurrence in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 774, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'Connor, J., concurring in part and concurring in judgment), the court of appeals observed that claims of impermissible "endorsement" of religion might occur even in the absence of "government speech" but based on private speech. *Pleasant Grove*, 483 F.3d at 1048.

Based on an analogy to Justice O'Connor's reasoning in her *Capital Square Review* dicta, the court of appeals in this case concluded with little analysis or discussion that Pleasant Grove's claim of government speech must fail. Apparently, the Tenth Circuit believed that just as an Establishment Clause

claim did not demand the existence of government speech, so too a Free Speech Clause claim might be brought against the government in the absence of government speech. Accordingly, it rejected Pleasant Grove's view that *Van Orden* necessitated the conclusion that a Ten Commandment monument donated to a city and accepted for placement in a public area had to constitute "government speech."

Many objections can be directed against the Tenth Circuit's attempt to analogize Establishment Clause claims directly to Free Speech Clause claims. It is obvious that the purposes of these constitutional clauses and the tests for applying them differ in important respects. It suffices here to point out that the unique facts underlying Justice O'Connor's concurrence in *Capital Square Review* totally undermine the Tenth Circuit's reliance on it. Nothing in that Establishment Clause case supports the court of appeals' rejection of Pleasant Grove's argument, based on *Van Orden*, that the Ten Commandment monument was government speech rather than private speech.

In *Capital Square Review*, a private party had placed a temporary, unattended religious display on government property. The issue addressed by Justice O'Connor was whether conditions of the placement of that private display on government property might support a finding of government endorsement of the private speech. She concluded that even though the display did not itself constitute government speech, the circumstances surrounding its placement might

constitute endorsement of the message by the government.[2]

The court of appeals has completely overstated the import of Justice O'Connor's discussion and misconstrued its applicability to this case. Justice O'Connor's concern in that case arises solely out of the undisputed factual premise that the display in question was a temporary, albeit unattended display belonging to a private party but placed on government land. Her question in that specific factual context was whether that private speech was guaranteed free speech protection "*on* all property owned by the State" *Capitol Square Review*, 515 U.S. at 74, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) emphasis added). To reiterate, her conclusion in dicta was that the government might still be found to improperly endorse religion by the circumstances of its treatment of unattended display of expressive privately-owned property.

The facts of the Pleasant Grove case, similar to those in *Van Orden*, are completely inapposite to those at issue in *Capitol Square Review*. In that case, the question was whether privately-owned property of an expressive nature located on public property might lead to the conclusion that the government was endorsing the message communicated by that private

---

[2] "While the plurality would limit application of the endorsement test to expression *by the government itself*, . . . I believe that an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 774, 115 S.Ct. 2440, 2452 (1995) (internal citations omitted)

property. In this case, there simply is no private ownership or private interest in property through which some party other than the government might be "speaking" *on* government property. In this case, it is uncontroverted that all the property that is "speaking" on government property belongs entirely to Pleasant Grove.

In fact, contrary to the Tenth Circuit's inference, Justice O'Connor's discussion supports Pleasant Grove's position. Absent the existence of any private ownership or other private interest in the unattended display on the property belonging to the government, no rational exists to suggest that private speech is at play in this case.

The Tenth Circuit, however, implausibly concluded that *after* property has been completely given to and accepted by the government, a donor somehow still retains sufficient connection with that property, now wholly owned by the government, by which that private donor still exercises its private free speech. Neither the logic of donation nor the precedent relied upon by the Tenth Circuit supports this tenuous reasoning.

B. The Tenth Circuit's conclusion that donated property remains private speech after being accepted by the government and thus triggers public forum analysis is in conflict with other federal circuit decisions interpreting the Free Speech Clause.

The alleged violation of the First Amendment in this case depends entirely upon the court of appeals' erroneous holding that a government-owned but donated monument placed on public property constitutes the private speech of the donor.

As ably demonstrated by Petitioners and other amici curiae, this holding conflicts with the law in numerous other Circuits. *See, e.g., ACLU Nebraska Found. v. City of Plattsmouth*, 419, F3d 772, 774, 778 (8th Cir. 2005); *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 287, 491 (7th Cir. 2000). *ACLU v. Shundler*, 104 F.3d 1435, 1444 (3rd Cir. 1997). *PETA v. Gittens*, 414 F.3d 23 , 28-29 (D.C. Cir. 2005).

Similarly, the court of appeals' subsequent conclusion—though flowing naturally from the court's first decision—is erroneous. No other Circuit has held that the placement of permanent property donated to the government on public land *ipso facto* creates a free speech public forum and triggers strict scrutiny analysis for private requests to place similar types of property on that land.

In fact, that law of other circuits provides that no First Amendment right exists for private citizens to place permanent monuments on property otherwise

classified as a public forum. *See, e.g., Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2nd Cir. 1989); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990); *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005).

II. The Tenth Circuit's decision unreasonably interferes with the government's free speech right to bring to the attention of the public distinctive contributions, formative historical events, or other worthy objects that the government reasonably concludes are of contemporary interest or concern to the community.

A. It is undisputed that the government may speak, and has spoken, freely about matters it believes are in the public interest regardless of whether such speech may contradict or coincide with the content of the private speech of individual citizens.

It is uncontested that the government has a right to free speech limited only by the other constitutional restrictions on the exercise of governmental power. See, e.g., Pleasant Grove's *Brief for Petitioners*, 20-22. In this case, no claim is made that Pleasant Grove has violated any other independent constitutional provision.

Absent a conflict with other constitutional restrictions, the government is permitted wide latitude in its ability to speak and articulate the message it

chooses. Such utterances may at times challenge or even conflict with the private speech of many citizens. At the same time, however, such government speech may overlap with the free speech views of many citizens.

In the case of government speech expressed through the placement of non-donated permanent monuments, there is no suggestion that this mode of government speech is impermissible or that it triggers public forum analysis. In this context, private citizens' demands to be given equal free speech access to erect similar monuments have no legal merit.

As argued above, there is little logic or legal support for the conclusion that solely because monuments have been donated to the government, i.e., belonged to another party prior to the government taking ownership of them, that somehow this analysis should change. Donated monuments accepted and placed by the government differ in no substantive way from monuments created directly by government commission.

As illustrated by the photographs in Appendix A ("App. A") of this amicus brief, the subject matter of monuments placed by the government in parks or other locations varies over a wide spectrum. It is clear, however, that the purpose of the government's speech in placing the vast majority of such monuments is to bring before the public consideration of historical, political, moral, cultural and/or artistic events, values, or policies that the government believes are worthy of public interest, concern, or even entertainment.

The following list illustrates examples of innumerable other donated monuments or memorials scattered across the United States on federal, state, county, and municipal property.

— *John Paul II Memorial Plaque, Boston Common, Boston, Massachusetts, donated by the International Order of the Alhambra to the City of Boston in June 1981. (App. 1a-1)*

— *Padre Junipero Serra Sculpture,* Golden Gate Park, San Francisco, California, donated by James D. Phelan to the City of San Francisco in 1907. (App. 1a-2)

— *Mohandas Karamchand Gandhi Sculpture,* Union Square Park, New York, New York, donated by the Gandhi Memorial International Foundation to the City of New York in 1986. (App. 1a-3)

— *Martin Luther King, Jr. Landmark Memorial,* Currie Park, West Palm Beach, Florida, multiple elements donated through the Martin Luther King Coordinating Committee to the City of West Palm Beach in 2004. (App. 1a-4)

— *Vietnam Veterans Memorial,* Washington Mall, Washington D.C., privately funded through the Vietnam Veterans Memorial Fund and accepted by the United States in 1984. (App. 1a-5)

— *Oregon Holocaust Memorial,* Washington Park, Portland, Oregon, donated by private funding through the Oregon Holocaust Memorial

Coalition to the City of Portland in 2004. (App. 1a-6)

— *The Willing Captive*, Lincoln Park, Newark, New Jersey, donated by Dr. J. Ackerman Coles to the City of Newark in 1895 (based on historical record of captives choosing to remain with their Indian tribe despite being allowed to depart). (App. 1a-7)

— *LOVE Sculpture*, John F. Kennedy Plaza, Philadelphia, Pennsylvania, donated by F. Eugene Dixon to the City of Philadelphia in 1978. (App. 1a-8)

— *Alice in Wonderland Sculpture*, Central Park, New York, New York, donated by George Delacorte to the City of New York in 1959. (App. 1a-9)

— *Balto Sculpture*, Central Park, New York, New York, donated by the Balto Monument Committee to the City of New York in 1925. (App. 1a-10)

B. The Tenth Circuit's decision will *dilute* the government's ability to highlight matters it believes appropriate for public awareness

The Tenth Circuit's ruling provides that if Pleasant Grove chooses to place donated monuments it has accepted in Pioneer Park it is also obligated under the First Amendment Free Speech Clause to allow all other private speakers to place their permanent

monuments subject only to "reasonable content-neutral resolution regulating the time, manner, or place of speech in the park." *Pleasant Grove*, 483 F 3d at 1054.

One significant consequence of this decision will be the inability of the government to isolate for special consideration its own speech. If all private actors may install permanent, unattended monuments in public areas once the government has installed a donated monument, it becomes significantly more difficult for the government to communicate its own speech in a manner highlighting the value of its message *as the speech of the government.*

If, for example, a city accepted and placed a donated Holocaust memorial in a park, *see, e.g. The Oregon Holocaust Memorial*, App. 1a-6, it might do so for a variety of salutary purposes: in order to impress upon the community's collective memory the danger caused by forfeiting democratic freedom, the risk of losing respect for human dignity, and, obviously out of respect and honor for those persons who died in that tragic event and their relatives

Under the Tenth Circuit's ruling, however, any neo-fascist or other group opposed to the memory of the Holocaust or any of those other high public ideals would be free to erect its own monument openly challenging the sentiments communicated by the Holocaust Memorial.

By being forced to welcome all conflicting permanent monuments, however, the government is deprived from expressing in the most physical,

concrete way that its speech represents the elected *government's own view* of those ideals, values or events that contribute to the public good. Instead, the government-installed monument becomes just one more expressive work standing alongside the myriad other monuments expressing private opinions protected by the Free Speech Clause.

In such circumstances, the rationale and motivation for the government choosing to install such monuments in the first place will be significantly diminished.

C. The Tenth Circuit's decision will *chill* the ability of the government to highlight matters it believes appropriate for public consideration

Of course, a possible, and perhaps probable, response to this threat of the dilution of government speech created by the Tenth Circuit's decision would be for a government simply to forego accepting monuments for public placement. In fact, the court of appeals itself offered this as a viable solution if a city desired to avoid the complications arising from the acceptance of donated monuments: a city could "ban all permanent displays of an expressive nature by private individuals." *Pleasant Grove*, 483 F.3d at 1054.

This result, however, would be even more chilling of government speech than the dilution problem. As the photographs in Appendix A illustrate, as a matter of historical fact governmental bodies frequently rely upon donated property to assist them in exercising their governmental speech rights.

The obvious rationale for this is the practical limit upon the government's ability to produce such monuments given the finite public resources to be allocated to these types of projects and the demand for money to be allocated for other more pressing purposes. In fact, the more important the government speech in terms of its aesthetic quality and magnitude, the more difficult it will be for the government to carry it out without private assistance. *See, e.g., the Vietnam Veterans Memorial* (App. 1a-5). The more significant the permanent speech exercised by government is, the more likely donation by private individuals would be required to play a part in it.

If the Tenth Circuit is correct in its conclusion that a donation of property to the government precludes the government from ever speaking through that property and also forces the government to place all private monuments, the result is clear: government will often remain mute.

CONCLUSION

The Tenth Circuit's decision is required neither by historical practice, logic, nor the text of the Constitution. Its decision will either dilute or severely chill the ability of the government to exercise its free speech right to highlight important intellectual, moral, political and artistic values that it reasonably believes are or should be of community interest. For the reasons stated, the Tenth Circuit's decision should be reversed.

Respectfully submitted

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APPENDIX

APPENDIX A

COLOR PHOTOS

DONATED SCULPTURES, MONUMENTS, AND MEMORIALS IN GOVERNMENT PARKS OR PUBLIC FORUMS

John Paul II Memorial
Boston Common
Donated by the International Order of the
Alhambra to the City of Boston in June 1981

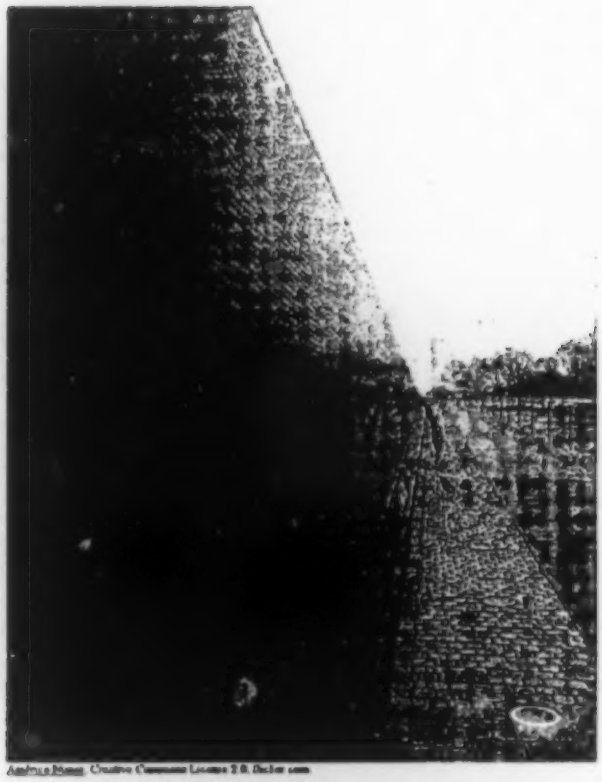
Padre Junipero Serra Sculpture
Golden Gate Park
Donated by James D. Phelan to
the City of San Francisco in 1907

1a-3

Navende Sharda, public domain

Mohandas Karamchand Gandhi Sculpture
Union Square Park
Donated by the Gandhi Memorial International
Foundation to the City of New York in 1986

Martin Luther King, Jr. Landmark Memorial
Currie Park
Multiple Elements Donated through the Martin Luther King Coordinating Committee to the City of West Palm Beach in 2004



Vietnam Veterans Memorial
Washington Mall, Washington D.C.
Privately funded through the Vietnam Veterans Memorial Fund and accepted by the United States in 1984

P. Medved, Creative Commons License 2.0, flickr.com

Oregon Holocaust Memorial
Washington Park
Donated by private funding through the Oregon Holocaust Memorial Coalition to the City of Portland Oregon in 2004

The Willing Captive
Lincoln Park
Donated by Dr. J. Ackerman Coles
to the City of Newark in 1895

Jeffrey M. Vinocur, Multi-license GFDL and Creative Commons CC-BY 2.5

LOVE Sculpture John F. Kennedy Plaza
Donated by F. Eugene Dixon to
the City of Philadelphia in 1978

Alice in Wonderland Sculpture
Central Park
Donated by George Delacorte
to the City of New York in 1959

Balto Sculpture
Central Park
Donated by the Balto Monument Committee
to the City of New York in 1925

AMICUS CURIAE BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

PLEASANT GROVE CITY, UT, *et al.*
Petitioners,

v.

SUMMUM
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

Brief of *Amici Curiae*
American Humanist Association
The American Ethical Union
Atheist Alliance International
Institute for Humanist Studies
Secular Student Alliance
Society for Humanistic Judaism
Unitarian Universalist Association
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INTEREST OF AMICI CURIAE[1]

This *amici curiae* brief is being filed on behalf of the American Humanist Association, The American Ethical Union, Atheist Alliance International, the Institute for Humanist Studies, the Secular Student Alliance, the Society for Humanistic Judaism and the Unitarian Universalist Association, a diverse array of secular and religious organizations, as advocates of religious liberty with a unique viewpoint concerning the history of religious freedom in the United States of America.

Amici feel that this case addresses core Humanist concerns about respect for differing views, religious egalitarianism and rational analysis. Many of *amici's* members who visit city, state and federal parks are especially concerned about the outcome of this case. *Amici* wish to bolster the principle of separation of government from religion in order to prevent their own disenfranchisement as well as to best preserve religious liberty in America.

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[1] *Amici*, identified in Appendix I, file this brief with the consent of all parties (as the Petitioner and Respondent have filed general consents with the Court). Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici*, their members or their counsel made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

"Two wrongs make a right." That would be the principle that this Court would establish should it affirm the central holdings of the court below.

Amici sympathize with Summum's viewpoint discrimination claim. Summum has simply requested that Pleasant Grove act neutrally regarding the display of religious monuments in its park. This request left the City with two options: the City could either allow Summum to display its Seven Aphorisms monument, or the City could remove the Ten Commandments monument that is communicating the religious message that it favors. Because both of these options were apparently unbearable, the City chose a third option: litigation.

Establishment Clause jurisprudence is currently in disarray after the decisions of *Van Orden*[2] and *McCreary County*,[3] as well as other decisions attributing sham secular purposes to inherently religious activities or icons. The holdings of the Tenth Circuit below are excellent illustrations of how confusion and disorder in one area of the law can quickly spread to other areas of law. In this case, the disorder in Establishment Clause jurisprudence has spread

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[2] *Van Orden v. Perry*, 545 U.S. 677 (2005) (Rehnquist, C.J., plurality opinion) (holding that a government-sponsored display of the Ten Commandments at the Texas State Capitol in Austin did not violate the Establishment Clause).

[3] *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (holding that a Ten Commandments display in the county courthouse was unconstitutional).

to the doctrines of public forum and government speech, mutating a simple Establishment Clause case into a convoluted free speech case.

The purpose of this brief by *amici* is twofold. First, *amici* wish to inform the Court that the Tenth Circuit erred both in holding that donated monuments remain the private speech of their donors and that public parks are public forums for donated permanent monuments. Second, *amici* are of the view that the proper interpretation of the Establishment Clause — that the government is prohibited from promoting or endorsing *any* religious viewpoint — compels the Court to clarify its jurisprudence, namely, that the Constitution prohibits government from displaying inherently religious monuments.

Accordingly, *amici* urge the Court to dismiss Summum's free speech claims and remand the case for a determination of whether the display of the Decalogue by Pleasant Grove violates the Establishment Clause in light of any guidance the Court may provide.

ARGUMENT

I. Prior Ten Commandments cases of this Court and the Tenth Circuit led to the artificial framing of this case as a free speech case, when the principal issue here is actually the City's violation of the Establishment Clause.

In this case, Pleasant Grove City ("Pleasant Grove" or "City") has adopted the religious

message of the Fraternal Order of Eagles ("Eagles") by accepting a Ten Commandments monument donated by the Eagles and displaying it in Pioneer Park ("the Park"), a public park. *See* (Defs.' Mem. Supp. Mot. Summ. J. ¶¶ 24, 29.) The City then denied Summum's requests to display a monument of its Seven Aphorisms in the same Park. (*Id.* at ¶ 32.) This would be a clear case of impermissible viewpoint discrimination if the Park was a public forum for the display of permanent monuments. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829-30 (1995). But the Park is a nonpublic forum for the display of monuments despite the Tenth Circuit's holding to the contrary.

The confusion in the Tenth Circuit regarding privately donated monuments has its origins in the 1973 case of *Anderson v. Salt Lake City*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973). In *Anderson*, the Tenth Circuit ignored the First Amendment prohibition against governmental acts "respecting an establishment of religion"[4] and held that the government's purpose for maintaining an illuminated Ten Commandments monument on courthouse grounds was "primarily secular, and not religious in character." *Id.* at 34.

---

[4] The full text of the First Amendment reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

Seven years later, in *Stone v. Graham*, this Court rejected the argument that the Ten Commandments are "the fundamental legal code of Western Civilization and the Common Law of the United States" and held that the government did not have a secular purpose for their posting. 449 U.S. 39, 41 (1980). The Court declared, "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* After this decision, many jurisdictions looked for ways to circumvent the prohibition articulated in *Stone*. Perhaps the most ingenious subversion of *Stone* was invented by the Tenth Circuit. *See Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997).

In *Callaghan*, the Tenth Circuit held that a Ten Commandments monument displayed on the front lawn of the county courthouse was the private speech of the donor, the Eagles, and not the speech of the government. *Id.* at 919 n.19. The court concluded that Summum sufficiently alleged that the government created a limited public forum by permitting the Ten Commandments to be displayed. *Id.* at 919. The Tenth Circuit reinforced the holding that a Ten Commandments monument remains the private speech of the donor in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002).

Thus, before this Court handed down the decisions in *Van Orden*, 545 U.S. at 691-92, and *McCreary County*, 545 U.S. at 881, the idea quickly gained momentum that the requirements

of the Establishment Clause could be avoided through public forum doctrine:

> Ten Commandments monuments that have been donated to government by private parties may survive an Establishment Clause challenge if they can be characterized as private religious speech in the public square.
>
> . . .
>
> [T]he increasingly visible doctrine of forum analysis may provide an opportunity for Ten Commandments proponents to finally go on the offensive and assert their Free Speech and Free Exercise rights in the public square.

Bradley M. Cowan. *The Decalogue in the Public Forum: Do Public Displays of the Ten Commandments Violate the Establishment Clause?*, 2 Ave Maria L. Rev. 183, 203 (2004).

Furthermore, there is evidence that a desire to display its own monument on government property is not Summum's *primary* motive. In an earlier case, Summum first sent a letter to a city requesting that the Ten Commandments monument be removed because it violated the Establishment Clause. *Summum v. City of Ogden*, 297 F.3d 995, 998 (10th Cir. 2002). It was only after this request was rejected that Summum then requested that its monument be displayed as well. *Id.*

II. The government's acceptance and display of a permanent monument constitutes government speech because these actions are an *implicit* adoption of the monument's message.

When, as here, the government accepts ownership of a privately donated monument and controls the manner of its display, the government crosses the line between a mere "regulator/manager" of a forum and becomes the "speaker" for purposes of free speech analysis. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 671 (1998) (noting that "selection and presentation" of a third-party message by the government is "speech activity"). The government cannot turn a blind eye to the fact that, when it displays a monument, a reasonable observer would assume that the government agrees with the content of the monument. *See Capitol Square v. Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., dissenting). Therefore, when the government accepts and displays a monument, it must be held to know that these actions convey an implicit message of adoption. A reasonable observer would not view a stone monument in the same way that it would view more temporary forms of speech on public property:

> When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, *while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands.*

Id. (emphasis added). Campaign signs, organized protests or public speeches are examples of forms of temporary speech that people know the government is required to permit in parks, regardless of whether the government agrees with the message. However, because a monument like the Ten Commandments is presumed to be a permanent structure, a reasonable observer would know that the monument is only in the Park because the government allows it to be there. *Id.* at 803

This Court analyzed an identical monument donated by the Eagles within the framework of government speech in *Van Orden*, 545 U.S. at 683-93. In ruling on an Establishment Clause challenge to a Ten Commandments monument on the grounds of the Texas State Capitol, none of the Justices of this Court indicated in *Van Orden*, *id.*, that the display was private speech, despite the fact that a finding of private speech would have foreclosed the Establishment Clause inquiry for at least four of these Justices. *See Pinette*, 515 U.S. at 764.

In *Pinette*, Justices Scalia, Kennedy, Thomas and Chief Justice Rehnquist maintained that the Establishment Clause only applies to "expression *by the government itself*, or else government action alleged to *discriminate in favor* of private religious expression or activity." *Id.* Therefore, if these same Justices believed in *Van Orden* that the Decalogue was not government speech, but instead remained the private speech of the Eagles, then they would have simply said that the Establishment Clause did not apply to this

monument. Because every member of the Court engaged in *some form* of Establishment Clause analysis in *Van Orden*, it is likely they each accepted that the Ten Commandments monument was not private speech.

The conclusion that the Ten Commandments monument here constitutes government speech is further supported by a statement inscribed onto the monument's face: "Presented to the City of Pleasant Grove and Utah County, Utah by Utah State Aerie Fraternal Order of Eagles." The Decalogue at issue in *Van Orden* was nearly identical except for the inscribed name of the recipient. The *Van Orden* inscription garnered this commentary:

> [T]he inscription implies, clearly and correctly, that it is the state which owns the monument. These Ten Commandments are, literally and constitutionally, the state's own words.

Erwin Chemerinsky, *Why Justice Breyer was Wrong in Van Orden v. Perry*, 14 Wm. & Mary Bill Rts. J. 1, 7 (2005).

Accordingly, the Tenth Circuit's holding that the display of a permanent monument in a public park remains the private speech of the donor should be reversed.

III. City parks are nonpublic forums for the display of permanent monuments.

A. The identity of the forum here is "permanent monuments in a city park" because identifying the forum as simply "a city park" does not account for the type of access sought by Summum.

The Tenth Circuit correctly *identified* the forum at issue in this case as "permanent monuments in the city park," but subsequently erred in *classifying the nature* of the forum as "public." *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1050 (10th Cir. 2007). This error arose because the Tenth Circuit lost focus on the type of access sought by Summum: installation of a permanent monument. This Court has explained that "forum analysis is not complete merely by identifying the government property at issue. Rather, in defining the forum [this Court has] focused on the access sought by the speaker." *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 801 (1985). Therefore, there are two necessary steps to forum analysis: (1) *identifying* the forum in terms of both the property at issue (e.g., a public library) as well as the type of access sought by the speaker (e.g., distributing leaflets or an organized demonstration), and (2) *classifying* the nature of the forum (traditional public forum, designated public forum, limited public forum, nonpublic forum or no forum). *See id.*

This Court has been quite specific when identifying the relevant forum in its free speech

cases. *See id.* at 790, 800-01 (rejecting a general identification of the forum as "the federal workplace" in favor of the more specific identification of "the Combined Federal Campaign [...] a charity drive aimed at federal employees"); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983) (identifying the forum as the "school's internal mail system"); *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (identifying the forum as a "*postal* sidewalk" and distinguishing it from the "*municipal* sidewalk" across the street) (emphasis added); *United States v. American Library Ass'n*, 539 U.S. 194, 206 (2003) (identifying the forum as "*internet access* in a public library") (emphasis added).

Although the Tenth Circuit claimed to identify the relevant forum here as "permanent monuments in the city park," when classifying the forum, the court stated only that, "*the city park* is, however, a traditional public forum." *Pleasant Grove City*, 483 F.3d at 1050. (emphasis added). Thus, the analysis of the Tenth Circuit merely identified the property and ignored the type of access sought by Summum. *Id.* In failing to "focus[] on the access sought" in the forum analysis for this case, *Cornelius*, 473 U.S. at 801, the Tenth Circuit arrived at the strikingly counterintuitive result that private parties may install permanent monuments in public parks subject only to the limited restrictions permissible in a public forum, *Pleasant Grove City*, 483 F.3d at 1052.

In her response to those dissenting from the

denial of a rehearing of the Tenth Circuit en banc, Chief Judge Tacha said, "[T]he Supreme Court has never distinguished between transitory and permanent expression for purposes of forum analysis. [...] The type of speech does not, and should not determine the nature of the forum." *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1178 (10th Cir. 2007). Judge Tacha is correct that the type of speech (which is another way of saying the "type of access sought") does not determine the *nature* of the forum; however, the type of speech determines the *identity* of the forum, and a correct identification of the forum is critical for proper classification of the forum's public or nonpublic nature. *Cornelius*, 473 U.S. at 789. In directing lower courts to "focus[] on the access sought by the speaker," this Court has implicitly mandated that distinguishing between transitory and permanent expression be an indispensable step of forum analysis. *Id.*

B. Once the forum is appropriately identified as "permanent monuments in a city park," it is clear that the nature of the forum is neither a traditional nor a designated public forum.

1. There is no tradition in this country of private parties installing permanent monuments in public parks without government approval.

Pioneer Park is not a traditional public forum for the display of permanent monuments because public parks have *not* "immemorially been held in

trust for the use of *the public* . . . for purposes of" the display of permanent monuments. *See Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (emphasis added). An aspect of government property, even if it "is a forum more in a metaphysical than a spatial or geographical sense," *Rosenberger*, 515 U.S. at 830, exists as a traditional public forum by virtue of its "long tradition" of use by the public for "assembly and debate," *Perry Education Assn.*, 460 U.S. at 45. Although this Court has stated unequivocally that "streets and parks" are traditional public forums for "assembly and debate," *id.*, a common-sense interpretation of "assembly and debate," supports the conclusion that the right of private speech in public parks traditionally extends only to non-permanent modes of communication.

It is instructive that this Court has never had to confront a case similar to the case at bar despite the fact that the tradition of displaying monuments on public property is older than the First Amendment itself. This is *not* a case where a private party has displayed an unattended structure for a temporary period. *See Pinette*, 515 U.S. at 758 (permitting the KKK to display an unattended cross in a public park for 18 days in December). This is *not* a case where some new mode of communication has been invented (e.g., electronic megaphones) and is being challenged on the ground that it does not have a long history of use. This also is *not* a case where a new category of government property has come into existence relatively recently (e.g., airports). *See International Society for Krishna Consciousness,*

Inc. v. Lee, 505 U.S. 672 (1992).[5] Instead, this is a case where both the mode of communication (permanent monuments) and the government property at issue (a public park) have existed "time out of mind." *See id.* Because this Court "has rejected the view that traditional public forum status extends beyond its historic confines," *Forbes*, 523 U.S. at 678, and there is no history of persons installing permanent monuments in city parks without authority derived from the government, this case does not involve a traditional public forum.

2. The fact that the City Council retained the right to accept or reject monuments that met the necessary criteria for acceptance shows that the City never intended to convert the Park into a public forum.

Pioneer Park is not a designated public forum for the display of permanent monuments because the City did not "intentionally open[] a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. The existence of criteria used by the City Council to decide whether to accept and display a monument does not create a public forum for private parties who qualify because the City Council makes the

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[5] The Court stated, "given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially ... time out of mind' been held in the public trust and used for purposes of expressive activity." *Id.* at 680 (quoting *Hague*, 307 U.S. at 515).

ultimate decision whether to accept a monument. The "selective access" resulting from the government's use of acceptance criteria to guide its ultimate determination, which is "unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Id.* at 804-05.

The fact that Pleasant Grove has produced no evidence of using its acceptance criteria (other than the rejection of the Seven Aphorisms) is not fatal to its claim that the Park was a nonpublic forum for the display of permanent monuments.[6] *See id.* at 805. In *Cornelius*, a case where the NAACP contested its exclusion from a charity drive aimed at federal employees, this Court stated, "Although the record does not show how many organizations have been denied permission throughout the 24-year history of the [charity drive], there is no evidence suggesting that the granting of the requisite permission is merely ministerial." *Id.* at 805. The fact that the government in *Cornelius* could not point to any other parties that had been rejected because of failure to meet the admission criteria did not demonstrate the existence of a public forum.

As in *Cornelius*, there is no evidence here to suggest that granting permission to install a monument that meets the stated criteria is a "merely ministerial" act of the Pleasant Grove City Council. *See also Forbes*, 523 U.S. at 680, 692 (Stevens, J., dissenting) (noting that the Court

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[6] However, this is strong evidence for Establishment Clause violations detailed in Section IV.

found that a televised debate was a nonpublic forum despite the fact that "No written criteria cabined the discretion of the AETC staff"). Because the forum here is nonpublic, the City has the right to deny private parties permission to install permanent monuments in the Park so long as the City acts in a reasonable and viewpoint-neutral manner. *Cornelius*, 473 U.S. at 806.

Accordingly, the Tenth Circuit's holding that public parks are public forums for the permanent display of privately donated monuments should be reversed.

IV. The permanent display of a religious monument on public property violates the Establishment Clause.

A. The First Amendment must be interpreted in light of the values it was intended to serve and the experiences gained from America's rapidly evolving religious identity.

The principle of separation of church and state is firmly established in this country as the meaning of the Religion Clauses of the First Amendment. *See Van Orden*, 545 U.S. at 683.[7] The phrase "respecting an establishment of religion" was the product of a political compromise made during a House-Senate

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[7] The Plurality stated, "One face [of the Court's Establishment Clause jurisprudence] looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a *separation between church and state*." *Id.* (emphasis added).

conference committee of the First Congress. *See* Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 855-56 (1987). Because there is no contemporaneous record of the committee explaining its meaning, *id.*, debate over the proper interpretation of the Establishment Clause has focused on statements of those who were involved in its formulation, as well as the American experience prior to and immediately after its ratification.

The first significant explanation of the Religion Clauses, which expressly equates them with the principle of separation of church and state, comes from President Thomas Jefferson in a letter to the Danbury Baptist Association:

> Believing with you that religion is a matter which lies solely between man and his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. [8]

Not only did this Court explicitly adopt the position that the First Amendment created a wall of separation between church and state, but the "wall" described in *Everson v. Board of Education* appeared to exceed the wall described by

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[8] Letter from Thomas Jefferson, U.S. President, to Danbury Baptist Association (Jan. 1, 1802), *available at* http://www.loc.gov/loc/lcib/9806/danpre.html.

Jefferson: "That wall must be kept high and impregnable. We could not approve the slightest breach." 330 U.S. 1, 18 (1947). Despite the unequivocal affirmation of the wall of separation in *Everson*, the Court has retreated from this idea in recent years, partially in response to revisionist histories.

The view that the Religion Clauses require, at the very minimum, the government to act *neutrally* toward religion gained broad acceptance with this Court in the last half of the twentieth century. Although the principle of neutrality is an alternative way of understanding the requirements of the Religion Clauses, this approach often compels the same outcome as would the wall of separation. However, application of the neutrality requirement has resulted in the government conferring benefits to religious groups in situations where a wall of separation would prevent conferring these benefits. *See, e.g., Rosenberger*, 515 U.S. at 845-46 (holding that the neutrality principle required a university to give a student newspaper with a religious viewpoint access to printing funds available to other student groups).

Although less stringent interpretations view the Religion Clauses as only preventing coercion or indoctrination, *Lee v. Weisman*, 505 U.S. 577, 591-92 (1992), the weakest role envisioned for the Establishment Clause was recently articulated by the dissenters in *McCreary County*, 545 U.S. at 899-903 (Scalia, J., dissenting). According to this interpretation, the government may act in a way that favors religion over non-religion, *id.* at 889,

and even monotheism over all other belief systems, *id.* at 899-900. Advocates of this interpretation highlight actions by the federal government occurring immediately after ratification of the Constitution and Bill of Rights favoring Judeo-Christian beliefs, such as references to "God" in Thanksgiving Proclamations, Inaugural Addresses and legislative prayer. *See McCreary County*, 545 U.S. at 896-97 (Scalia, J., dissenting).

Though the historical analyses conducted by advocates of these various approaches are not all created equal, the fact that each advocate finds support for his or her view in certain words and actions of the Framers demonstrates the error of interpreting the Religion Clauses solely by reference to their "original intent." *See* Kurland, *Origins of the Religion Clauses*, *supra*, at 841-42; *see also Lee*, 505 U.S. at 626 (Souter, J., concurring) (noting that "the Framers . . . like other politicians, could raise constitutional ideals one day and turn their backs on them the next"). The shifts[9] in this Court's understanding of the Religion Clauses over the last sixty years reveal that a method of constitutional interpretation

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[9] For evidence of the Court's shift in interpretation of the Religion Clauses, *compare Everson*, 330 U.S. at 18 ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."), *and Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."), *with Van Orden*, 545 U.S. at 684 ("we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.").

grounded in "original intent" is usually as subjective as any other interpretive method, though lacking in the intellectual honesty to acknowledge its subjectivity. Furthermore, interpretation of the Religion Clauses solely by reference to the actions and attitudes of the Framers fails to adequately address the significant changes in religious identity that have occurred, and continue to occur, in this country.

Although the Ten Commandments are viewed as "revealed truth" by most Judeo-Christian denominations, the first *Ten Amendments* to the Constitution have always been viewed as a triumph of human reason — no more and no less. The Religion Clauses of the First Amendment resulted from lessons learned from the experience of hundreds of years of established religion. The Constitution created a government that derived its authority from "the People," in sharp contrast to the divine right claimed by the king from whom they had declared independence a decade earlier. U.S. Const. pmbl.[10] There is no mention of God in the document, and the sole provision in the original Constitution relating to religion states: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl. 3.[11]

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[10] The full Preamble to the Constitution reads as follows: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." *Id.*

[11] The full text of Article VI, Clause Three, reads as follows: "The Senators and Representatives before mentioned, and

The Constitution and the purely secular government it created were produced by the application of human reason to human problems. Though the Constitution remains an incredible accomplishment by any measure, human reason did not dry up with the ink on its parchment. "We the People of the United States" are now confronted with problems that were clearly inconceivable to the authors of the Constitution, but we have an additional two hundred years of experience from which to draw guidance. U.S. Const. pmbl.

Neither the creation of a wall of separation nor the maintenance of government neutrality toward religion is an end goal in itself. The requirements arising from both of these approaches are simply means to ensure that the Religion Clauses safeguard the values of religious liberty: freedom of conscience and government non-involvement in religion. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 351 (2002). Although the First Amendment does not explicitly announce these values, they are revealed by an examination of the needs of the new government. *See* Kurland, *Origins of the Religion Clauses*, *supra*, at 856. The United States desperately needed a unified, national government, and the Framers understood that a nation fractured along religious

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the members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." *Id.*

lines could not perform effectively. Because of the religious heterogeneity between sections of the country, religious minorities and persons professing no religion needed protection from the actions of those in the majority.[12] The Religion Clauses were included in the Bill of Rights to provide this protection.

An additional purpose of the Establishment Clause was to ensure not only that religion not corrupt government but also that government not corrupt religion. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments* (1786), *reprinted in* THE SEPARATION OF CHURCH AND STATE: WRITINGS ON A FUNDAMENTAL FREEDOM BY AMERICA'S FOUNDERS, at 56 (Forrest Church ed., Beacon Press 2004).[13]

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[12] The Framers also understood that the "majority" frequently shifts depending not only upon how political boundaries are drawn (e.g., location of county or state borders) and how representation is determined in legislative bodies (e.g., number of representatives per state in the House of Representatives), but also "depend[ing] on a prior determination of how to define and categorize religious groups." Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U. L.Q. 919, 948 (2004); *see also Regents of the University of California v. Bakke*, 438 U.S. 265, 295 (1978) ("The concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments.").

[13] Madison's view of the corrupting influence of government on religion is reflected in paragraph seven: "Because experience witnesses that ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the clergy; ignorance and

This Court should retain the wall of separation approach because it provides the best protection for the values embodied in the Religion Clauses. This approach is supported by both history and precedent. But because no interpretation of the Religion Clauses can ever be "correct" to the exclusion of all others, the most persuasive reason to protect the wall of separation from degradation is that hundreds of years of collective human experience in matters of church and state interaction have demonstrated the efficacy of this approach. The rapidly evolving religious attitudes in this country make the wall of separation a necessity for all Americans, not simply a luxury for those whose beliefs are currently in the minority.

B. A fundamental purpose of the First Amendment was to protect the religious liberty of those with minority beliefs.

The counter-majoritarian nature of the Establishment Clause — and the Bill of Rights as a whole — is self-evident: "By definition, any enforcement of the Establishment Clause involves the Court striking down a government practice that the majority wants." Chemerinsky, *Why Justice Breyer was Wrong in Van Orden v. Perry*, *supra*, at 3. This Court explained the essential role played by the Bill of Rights in protecting minorities from the unrestrained will of the majority in *Barnette*, 319 U.S. at 638:

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servility in the laity; in both, superstition, bigotry, and persecution." *Id.* at 65.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Compared to other nations at the time, the founding-era United States had remarkable religious diversity. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1990) ("in 1789 . . . the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world."). Although the religious differences of that era may seem trivial when compared to the plurality of beliefs held by Americans today, the members of the First Congress were conscious of the urgent need for institutions that would serve all citizens equally, regardless of religious allegiance. *See* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U. L.Q. 919, 939-40 (2004). The fact that the early United States did not have significant populations of Hindus, Buddhists, Muslims, or Pagans does not change the fact that the Framers intended for the Religion Clauses to extend to the adherents of *every religion in the country. Id.*

Furthermore, because many members of the First Congress were Deists, there is a strong likelihood that at least these individuals intended for the constitutional protections to extend to the nonreligious. Although Deism acknowledged the existence of a "Creator" or "First Cause," Deists were often derided as atheists because they believed in the primacy of human reason and rejected the idea of divine revelation. Frank Lambert, *The Founding Fathers and the Place of Religion in America* 161, 176-77 (Princeton University Press 2003). Because a significant portion of the population regarded Deists as atheists, many of the Framers likely valued the protection of nontheistic beliefs, even if only out of an instinct for political self-preservation.

In 2007, over sixteen percent of people in the United States were religiously "unaffiliated."[14] The fact that the number of Americans with no religious affiliation is greater than the number of African Americans[15] in this country demonstrates the significance of this segment of the population. However, nonreligious persons are often consciously overlooked in discussions about the

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[14] The Pew Forum on Religion & Public Life, *The US Religious Landscape Survey* (Fed. 25, 2008), *available at* http://religions.pewforum.org/affiliations. The Pew Forum surveyed 35,556 cases from May 8, 2007, to August 13 2007. The "Unaffiliated" 16.1% is comprised of "Atheist" 1.6%, "Agnostic" 2.4% and "Nothing in particular" 12.1%.

[15] An estimated 38,342,549 Americans (approximately 12.7% of the population) considered themselves "Black or African American" in 2006. U.S. Census Bureau, General Demographic Characteristics: July 2006 (2006), *available at* http://factfinder.census.gov/home/en/official_estimates.html.

role of religion in government. The dissenting opinion in *McCreary County* justified the display of the Ten Commandments using this tactic: "The three most popular religions in the United States, Christianity, Judaism, and Islam — which combined account for 97.7% of all believers — are monotheistic." 545 U.S. at 894. By only accounting for Americans who are "believers," those who do not revere the Ten Commandments were portrayed as a significantly smaller minority than is actually the case. Furthermore, the *McCreary County* dissent demonstrated a fundamental misunderstanding of the protection the First Amendment provides for minorities:

> [N]umerous provisions of our laws and numerous continuing practices of our people demonstrate that the government's invocation of God (and hence the government's invocation of the Ten Commandments) is unobjectionable — including a statute enacted by Congress almost unanimously less than three years ago, stating that "under God" in the Pledge of Allegiance is constitutional.

545 U.S. at 899. Simply because actions are unobjectionable to a majority does not make them unobjectionable to the Constitution. This statement only highlights the critical necessity of the Religion Clauses for the protection of the rights of the minority in matters of religion and conscience.

C. Because the Ten Commandments are not "foundational" to American law and government, and because they have enormous religious significance to the Judeo-Christian faiths, the government lacks a secular purpose for their display on public property.

1. The Ten Commandments are not "foundational" to American law and government.

Although the claim that the Ten Commandments are foundational to American law and government has been debated for decades in courts, historians have overwhelmingly rejected this claim. *See, e.g.*, Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & Religion 525, 558 (1999-2000) ("The historical record fails to support claims of a direct relationship between the law and the Ten Commandments."); Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 Fordham L. Rev. 1477, 1516 (2005) ("Monuments to the Ten Commandments thus do not reflect an objective or accurate representation of the historical development of American law. . . . Rather than reflecting our legal heritage, to a great extent the Ten Commandments fly in the face of the evolution of American law, which has been towards secular freedoms and liberties and towards greater religious diversity."); David A. Friedman, *Why Governmental Decalogue Displays Endorse Religion*, 23 T.M. Cooley L. Rev. 109, 109 (2006)

("claims that the Ten Commandments 'significantly influenced' the development of American law or the American governmental system lack historical support.").

Perhaps the best evidence that the Ten Commandments did not play a significant role in American law and government is that this Court has never attempted to define that role. The Court has been far more vague on this subject than the already-vague, "foundational" role claimed by Texas in *Van Orden*, 545 U.S. at 712 n.9 (Stevens, J., dissenting), and Kentucky in *McCreary County*, 545 U.S. at 844. The Plurality in *Van Orden* stated, "Such acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America." 545 U.S. at 688. The phrase "Nation's heritage" potentially implies a much broader conception of both the time frame and type of influence that are relevant for finding a Ten Commandments display constitutional. *Id.*

Unfortunately, because of the ambiguity of the language used by the Plurality in *Van Orden*, *id.*, even if all parties accepted as conclusively proven the fact that the Ten Commandments were not "foundational to American law and government," this might not be enough to defeat sham secular purposes under the Court's current Establishment Clause jurisprudence. The inherent vagueness of the concepts of "mere acknowledgment" and "Nation's heritage" in *Van Orden* has created more problems than it has solved. *Id.* Because of the high probability of sham secular purposes that this vagueness

engenders, this Court should review Establishment Clause challenges to the display of the Ten Commandments on public property with "a strong presumption *against" their constitutionality. *Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting) ("The Establishment Clause should be construed to create a strong presumption against the installation of unattended religious symbols on public property.").

2. Those who advocate the display of the Ten Commandments on public property do so for religious, not secular, purposes.

Most people in this country who support the display of the Ten Commandments on public property admit unapologetically that the display is for religious purposes. *See* Chemerinsky, *Why Justice Breyer was Wrong in Van Orden v. Perry*, *supra*, at 7. However, government officials know that rulings of this Court require that they make some effort to articulate a secular purpose for their actions, regardless of their personal opinion of the importance of the Establishment Clause. Justices of this Court, however, are able to discuss their understanding of Establishment Clause requirements with far more candor:

> [A]t oral argument in *Van Orden*, Justice Scalia left no room for doubt that he believes that Ten Commandments monuments are constitutional despite the fact that they convey a religious, rather than a secular, message:

> It's not a secular message. I mean, if you're watering it down to say that the only reason it's okay is it sends nothing but a secular message, I can't agree with you. I think the message [that the Ten Commandments monument] sends is that law is—and our institutions come from God. And if you don't think it conveys that message, I just think you're kidding yourself.

Thomas B. Colby. *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 Nw. U. L. Rev. 1097, 1107 (2006) (citing Transcript of Oral Argument at 29, *Van Orden v. Perry*, 545 U.S. 677 (2005)).

Although supporters of Ten Commandments displays on public property may win legal victories by articulating sham secular purposes, these victories do not come without a cost to their own beliefs:

> The irony is that those who favor the Ten Commandments on government property, such as between the Texas State Capitol and the Texas Supreme Court, do so precisely because of the religious content of the Ten Commandments and the importance of the Decalogue as a religious symbol. Yet, supporters of Ten Commandments monuments are forced to defend them as secular, as Justice Breyer did. This denigrates religion by denying the

essential and profoundly religious nature of the Ten Commandments.

Chemerinsky, *Why Justice Breyer was Wrong in Van Orden v. Perry, supra*, at 7. A greater irony is that a central purpose of the Establishment Clause was to avoid exactly what is happening all over the country regarding Ten Commandments displays: the cheapening (corruption) of religion by government involvement. In the words of Justice Blackmun, "The city has its victory—but it is a Pyrrhic one indeed." *Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (dissenting from the Court's finding of a secular purpose for a crèche on public property).

D. Display of religious monuments on public property is unconstitutional because the *effect* of the government's display is the endorsement of religion.

The display of religious monuments on public property violates the Establishment Clause because "it sends the ancillary message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 310 (2000) (internal quotation marks omitted) (citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). More specifically, the display of the Ten Commandments sends the message to nonadherents of Judeo-Christian religions that they are not full members of the political community.

1. A reasonable observer would view a Ten Commandments monument in a public park as government endorsement of religion.

By itself, the text of the Ten Commandments sends an overwhelmingly religious message. Although there are many contexts — such as a museum exhibit — in which governmental display of a Ten Commandments monument can be appropriate, the text alone is sufficient to create a "strong presumption against" the constitutionality of its display in a public park. *Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting). Far from rebutting this presumption, the context in which the Decalogue is displayed in Pioneer Park only heightens the effect of endorsement.

One of the first things that a reasonable observer would likely notice on any Ten Commandments display is the phrase "I AM the LORD thy GOD."[16] Although the monument might be "passive" in the sense that the stone itself is not going to move, there is nothing passive about the inscribed text. *Cf. Van Orden*, 545 U.S. at 686, 691 (describing the Ten Commandments monument at issue as "passive"). The Commandments address not simply secular matters, but also — and most importantly for those who revere the Decalogue — they mandate what one must believe. "Thou shalt have no other Gods before me" is an unequivocal proclamation

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[16] This phrase appears in large letters on the Pleasant Grove and Texas State Capitol Decalogues immediately below the phrase "the Ten Commandments."

that all other systems of belief are wrong. Furthermore, because the first four of the Commandments deal with purely religious matters, they would clearly be unconstitutional if enacted into law in the United States.

The design of the Ten Commandments monument in Pioneer Park accentuates the religious nature of the text and its link to civil government. The text of the most religiously significant part of the Ten Commandments — the statement "I AM the LORD thy GOD" — is larger, and set apart from, the text of the other commandments. The probability that an observer would see this monument as anything other than an endorsement of religion is further diminished by the presence of Jewish and Christian symbols: two Stars of David and the Greek letters "Chi" and "Rho," symbolizing or abbreviating "Christ." The monument also has a depiction of an American eagle holding an American flag centered above the text of the Commandments. In a case involving a nearly identical monument on government property, the Seventh Circuit found that this symbol strengthened the appearance of government endorsement:

> [T]he placement of the American eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion, or more specifically these two religions, and civil government.

Books v. City of Elkhart, 235 F.3d 292, 307 (7th

Cir. 2000).

A reasonable observer would also see the location and context of the Ten Commandments monument in Pioneer Park as an endorsement of religion. As an initial matter, a reasonable observer would know that a permanent monument would not be on public property if the government did not want it to be there. Of the approximately fourteen monuments or permanent structures displayed in the Park, the Ten Commandments monument is the only item with any religious significance. *See* (Defs.' Mem. Supp. Mot. Summ. J. ¶¶ 11-27.)[17] Although the City claims that the monuments in the Park are unified by the theme of Pleasant Grove's pioneer history, (Defs.' Mem. Supp. Mot. Summ. J. ¶¶ 6-8), the presence of the "September 11 Monument" demonstrates the falsity of this claim (Defs.' Mem. Supp. Mot. Summ. J. ¶ 20). The fact that the Ten Commandments were displayed near other secular monuments only highlights the fact that this is the religious message that the government endorses.

There has been a long-running debate in this Court over the degree of knowledge to attribute to the "reasonable observer" for purposes of

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[17] The monuments and/or permanent structures in Pioneer Park are as follows: the Ten Commandments monument at issue; a September 11 monument; a log cabin; "Old Bell School;" a water well; a granary; a flour mill stone; the "Nauvoo Temple Stone;" the original Pleasant Grove Town Hall; the original fire department's hose cart house and plaque; the original Pleasant Grove train station sign; the winter corral; a rose garden; a gazebo; and benches, trees and plaques. *Id.*

determining the effect of a display for Establishment Clause analysis. *See, e.g., Pinette*, 515 U.S. at 799-84, 800-08. To hold that a reasonable observer would perceive a Ten Commandments monument displayed on public property as simply the government's acknowledgment of the supposedly foundational role of the Ten Commandments on American law and government — and not as an endorsement of religion — presupposes an unrealistic degree of historical knowledge on the part of the observer. Ironically, however, it also presupposes an inaccurate knowledge of history.

2. Even if a religious monument is considered private speech in a public forum, its display violates the Establishment Clause if the effect is government endorsement.

The mere fact that a religious monument on public property is characterized as "private speech" will not immunize the government from an Establishment Clause challenge. A government action — such as the City's acceptance and display of the Decalogue — will violate the Establishment Clause if it has the effect of endorsing religion, regardless of the identity of the speaker. *See Santa Fe Independent School Dist.*, 530 U.S. at 303 ("A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause."); *see also*

Pinette, 515 U.S. at 772 (O'Connor, J., concurring) ("the endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols, even where a neutral state policy toward private religious speech in a public forum is at issue."); *County of Allegheny v. ACLU*, 492 U.S. 573, 600 (1989) (holding that the display of a crèche on a courthouse staircase violated the Establishment Clause even though the crèche itself was privately owned and a sign disclosed its private ownership).

E. The requirement of government *neutrality* with respect to religion prohibits the display of permanent religious monuments on public property.

Although the principle of government neutrality toward religion has been embraced by Justices of this Court from every ideological camp, the actual requirements of neutrality have been disputed. Until recently, it was understood that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson*, 393 U.S. at 104; *Everson v. Board of Ed. of Ewing*, 330 U.S. at 15-16; *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985). Various Justices have worried that government "neutrality toward religion" will be viewed as "hostility to religion." *Van Orden*, 545 U.S. at 684. However, the perception of government hostility is, for the most part, subjective. It is natural for those who support government policies favoring their

religious beliefs to interpret Establishment Clause challenges as hostility toward these beliefs. And because "any enforcement of the Establishment Clause involves the Court striking down a government practice that the majority wants", it is very likely that the *majority* may interpret this as hostility. Chemerinsky, *Why Justice Breyer was Wrong in Van Orden v. Perry*, *supra*, at 3.

The goal of government neutrality toward religion can only be achieved with equal regard for majority and minority beliefs by ensuring that the wall separating church and state is "kept high and impregnable." *Everson*, 330 U.S. at 18. The desire to prevent the appearance of hostility toward the beliefs of the majority simply legitimates the long history of hostility toward minority beliefs. The majority of those who favor display of the Ten Commandments *intend* for it to evince their hostility toward minority beliefs. Furthermore, the choice to "acknowledge" the role played by one religion, while not "acknowledge[ing]" the role played by another religion, is a violation of religious neutrality. *Cf. Van Orden*, 545 U.S. at 683. As demonstrated by the spurious use of history in Ten Commandments cases across this country, there is no principled or neutral way to decide which religious beliefs are deserving of the government's "acknowledgment" and which are not.

There is nothing neutral about a Ten Commandments monument of this sort. Such monuments favor religion over nonreligion, monotheistic religions over polytheistic and nontheistic religions, Abrahamic religions over

non-Abrahamic religions,[18] Judeo-Christianity over Islam,[19] Christianity over Judaism,[20] Protestantism over Catholicism,[21] and Evangelical Protestantism over Non-evangelical Protestantism. The Religion Clauses forbid this favoritism. Although neutrality and separation are not incompatible, an interpretation of neutrality that would permit government favoritism is incompatible with separation and with the values enshrined in the Religion Clauses.[22]

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[18] This assumes that the Ten Commandments have religious significance for Christians, Jews and Muslims.

[19] The Ten Commandments do not have the same significance in Islam as they do in Christianity or Judaism. Friedman, *Why Governmental Decalogue Displays Endorse Religion, supra*, at 124.

[20] "God" is not a neutral term. *See* Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. Va. L. Rev. 275, 296-97 (2007) ("many Christians would find it problematic if 'Jehovah' or 'Allah' were substituted in place of the ubiquitous and purportedly inclusive 'God' of Judeo-Christianity. Whether one pledges allegiance to the United States, for example, as nation under 'Jehovah,' 'Allah,' or 'God,' is not a matter of indifference to American Christians, just as we expect that it is not a matter of indifference to Jews, Muslims, or adherents to other theistic faiths.")

[21] The King James translation on the monument is not accepted as authoritative by Catholics.

[22] *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 45 (1997) ("In the Court's view, separation is and always has been a means of maximizing religious liberty, of minimizing government interference with religion, and thus, of implementing neutrality among faiths and between faith and disbelief.").

The fact that the first President, the First Congress and the first Supreme Court favored Judeo-Christianity does not render the favoring of Judeo-Christianity constitutional today. This Court has said, "[h]istory cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *County of Allegheny*, 492 U.S. at 603; *see also Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 678 (1970) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.").

Establishment Clause jurisprudence is currently in disarray because courts continue to justify clear constitutional violations on the ground that certain actions have violated the Establishment Clause for so long that these violations no longer matter. In order to remedy the confusion resulting from the seemingly inconsistent holdings of *Van Orden*, 545 U.S. at 691-92, and *McCreary County*, 545 U.S. at 881, this Court must to put a stop to the growing practice of ascribing nonexistent secular purposes to the Ten Commandments, reaffirm the principle of separation of church and state, and confirm that the requirement of complete government neutrality extends to all systems of belief.

CONCLUSION

Judgment of the court below should be reversed and the case remanded to the circuit court with instruction that the parties brief and argue the question of whether the display of the Ten Commandments monument in Pioneer Park violates the Establishment Clause of the First Amendment.

Respectfully submitted,

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June 23, 2008

APPENDIX

APPENDIX

IDENTIFICATION OF *AMICI CURIAE*

The American Humanist Association advocates for the rights and viewpoints of Humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The Mission of the American Humanist Association is to promote the spread of Humanism, raise public awareness and acceptance of Humanism and encourage the continued refinement of the Humanist philosophy.

The American Ethical Union is a federation of Ethical Culture/Ethical Humanist societies and circles throughout the United States. Ethical Culture is a Humanistic religious and educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society. The American Ethical Union has participated in a number of amicus curiae briefs in defense of religious freedom and church-state separation.

Atheist Alliance International is an organization of independent religion-free groups and individuals in the United States and around the world. Its primary goals are to help

democratic, atheistic societies become established and work in coalition with like-minded groups to advance rational thinking through educational processes. Through the Alliance, members share information and cooperate in activities with a national or international scope.

The Institute for Humanist Studies is a think tank based in Albany, New York, whose mission is to promote greater public awareness, understanding and support for Humanism. The Institute specializes in pioneering new technology for the advancement of Humanism and also engages in grassroots and legislative advocacy in order to further the rights and interests of the nonreligious. Founded in 1999, the Institute for Humanist Studies provides accessible and authoritative information about humanism to academia, the media and the general public, while providing financial grants to other nonreligious groups in its efforts to bring the Humanist movement into a more cooperative relationship.

The Secular Student Alliance is a network of over 130 atheist, agnostic, Humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States. The vast majority of the affiliates are at high schools and colleges in the U.S. The mission of the Secular Student Alliance is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.

The Society for Humanistic Judaism mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. The Society for Humanistic Judaism members want to ensure that they, as well as people of all faiths and viewpoints, will continue to feel comfortable in America's parks.

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States and North America. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. The Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom. In particular, the Association's resolutions call for religious neutrality in government actions.

AMICUS CURIAE BRIEF

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PLEASANT GROVE CITY, UTAH, ET AL.,
Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE*, IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*

The *amici* joining in this brief represent diverse religious and secular beliefs, but share a common interest in preserving religious liberty and preventing religious discrimination.[1]

Amici have a substantial interest in ensuring that the erroneous application of free-speech principles does not weaken the Establishment Clause's strict prohibition against denominational preferences — a vital protection for freedom of conscience.

Because several *amici* have joined in this brief, more detailed descriptions of each appear in an appendix. The *amici* are:

- The American Jewish Committee, a national organization dedicated to protecting the civil and religious rights of Jews and to defending religious rights and freedoms for all Americans.
- Americans United for Separation of Church and State, a national, nonsectarian public-interest organization committed to preserving religious liberty and the separation of church and state.
- The Anti-Defamation League, organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States.

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[1] The parties have consented to the filing of this brief and have lodged consent letters with the Clerk. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* or their counsel have made any monetary contribution to the preparation or submission of this brief.

- The Baptist Joint Committee for Religious Liberty, an organization serving fifteen cooperating Baptist conventions and conferences throughout the United States that deals exclusively with religious-liberty and church-state-separation issues.
- People For the American Way Foundation, a nationwide, nonpartisan citizens' organization established to promote and defend civil and constitutional rights, including First Amendment freedoms.

INTRODUCTION

The decision below is out of step with this Court's free-speech jurisprudence. What may not be obvious from the face of the opinion is why the panel went so badly awry. The explanation lies not so much in the panel's misunderstanding of free-speech law as in the Tenth Circuit's longstanding misapplication of another provision of the First Amendment — the Establishment Clause.

In *Anderson* v. *Salt Lake City*, 475 F.2d 29 (10th Cir. 1973), the Tenth Circuit held that the Ten Commandments are principally secular, so the government's display of them cannot *under any circumstance* give rise to Establishment Clause concerns. From that holding flowed a systematic distortion of the Circuit's First Amendment jurisprudence.

In attempting to restore coherence to free-speech law here, this Court should be mindful of the fact that the question presented is an artifact of *Anderson*; it does not fairly reflect the parties' actual dispute or the genuine issues that the controversy implicates. The Establishment Clause provides the rubric for addressing claims that government acted with religious animus, so it is to Establishment Clause jurisprudence that the courts below should turn in adjudicating this case.

BACKGROUND

The Tenth Circuit's decision in *Anderson* was one of the first Establishment Clause challenges to a religious display, and the very first, so far as we are aware, to a Fraternal Order of Eagles-donated Ten Commandments monolith. In that case, a panel of the Tenth Circuit concluded that the Ten Commandments are "primarily *secular*," so their display on public property could never be an establishment of *religion*. 475 F.2d at 34 (emphasis added).

Seven years later, however, this Court rejected *Anderson*'s premise. The Court held in *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam), that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and * * * do not confine themselves to arguably secular matters." The Court therefore struck down a Kentucky statute requiring the Decalogue's posting in public-school classrooms because the postings had no conceivable secular purpose or object. *Id.* at 41-42.

Beginning in the mid-1990s, Respondent Summum — a Utah-based church — made a series of requests to have the Seven Aphorisms of its faith displayed alongside previously erected Ten Commandments monoliths donated to Utah cities by the Eagles. Those requests having invariably been denied, Summum brought religious-discrimination actions, alleging that the cities were unconstitutionally preferring majority faiths. See, *e.g.*, *Summum* v. *City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Summum* v. *Callaghan*, 130 F.3d 906 (10th Cir. 1997). Although Summum principally raised federal Establishment Clause claims in its earlier cases, it also recognized that *Anderson* effectively barred those claims. For if, as a matter of law, the Ten Commandments are nonreligious, favoring them over the Seven Aphorisms could not constitute playing favorites among faiths. So while Summum sought to have *Anderson* overturned in light of *Stone*, it also offered the Tenth Circuit an alternative route to granting the requested relief: It repackaged its religious-discrimination claim as a free-speech one, arguing that favoring displays representing majority faiths over ones representing minority faiths constitutes content or viewpoint discrimination.

The panels in *Callaghan* and *Ogden* both expressly recognized that, "[s]ince *Anderson* was decided, * * * more recent cases, including [*Stone*], cast[] doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature." *Callaghan*, 130 F.3d at 910 n.2; accord *Ogden*, 297 F.3d at 1000 n.3 ("the health of our *Anderson* precedent is subject to question"). But they accepted

Summum's invitation to use the Free Speech Clause to curtail the religious favoritism to which Summum objected, thereby avoiding having to decide whether a three-judge panel alone could recognize *Anderson*'s demise or whether the en banc court would instead have to be convened. *Ogden*, 297 F.3d at 1000 n.3; *Callaghan*, 130 F.3d at 913 n.8. In deciding the cases that way, however, the panels stretched this Court's free-speech jurisprudence past the breaking point.[2]

Having twice won similar cases without the Tenth Circuit's being willing to reach the Establishment Clause issue, Summum opted in this case to raise only the free-speech claim, as well as a supplemental state-law religious-discrimination claim under the Utah Constitution's Establishment Clause (thus potentially sidestepping the *Anderson* morass because Utah's Establishment Clause is more strict than the First Amendment's (see *Manning* v. *Sevier County*, 517 P.2d 549, 552-553 (Utah 1973) (Callister, Henriod, and Crockett, JJ., concurring))). Although Summum raised the state-law establishment claim in the brief it filed with the district court in this case, both that court and the court of appeals decided the case under the same doctrinal framework that the Tenth Circuit had decided all the other Summum cases: free speech. So as the case now comes before this Court, only the free-speech claim has been briefed, while the more salient

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[2] In *Society of Separationists* v. *Pleasant Grove City*, 416 F.3d 1239, 1241 n.1 (10th Cir. 2005), the Tenth Circuit finally held that *Anderson* was superseded by *Van Orden* v. *Perry*, 545 U.S. 677 (2005), and *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). But *Callaghan*'s and *Ogden*'s free-speech rulings remained circuit precedent binding on the panel in this case.

clause — the Establishment Clause — receives nary a mention.

SUMMARY OF THE ARGUMENT

The ghost of *Anderson* haunts this action. The parties' litigation of the case, the record developed, and the preliminary-injunction decision now under review have all been distorted by a bad ruling that should have been recognized as defunct a decade and a half ago. So while in any other circuit this case would have been a run-of-the-mine Establishment Clause action, this Court now confronts a free-speech decision that defies reason as well as legal doctrine.

The panel below erred in holding that the items on display in Pioneer Park are private speech. The permanent monuments in the park are quintessential government speech, having been crafted or adopted by the City. And when government is the speaker, it is free to choose its message, subject to constitutional limitations on official action but not to free-speech scrutiny.

The Tenth Circuit also erred by inviting the parties to litigate under the Free Speech Clause a case for which the Establishment Clause defines the scope of the rights in question. Under the latter Clause, the relevant constitutional strictures are clear: Whatever else the Establishment Clause might mandate, it straightforwardly forbids official discrimination against minority faiths like Summum.

While the record from the preliminary-injunction proceedings is understandably thin with respect to the object of Pleasant Grove's professed display policy (because under *Callaghan* and *Ogden* the refusal to display Summum's Seven Aphorisms was a *per se* free-speech violation), there is more than a whiff of religious animus here. If Summum can prove at trial that Pleasant Grove had a discriminatory object in denying its request to display the Aphorisms in Pioneer Park, it should be entitled to some form of relief.

ARGUMENT

I. The Tenth Circuit Erred in Applying Free-Speech-Forum Analysis Because the Permanent Monuments in Pioneer Park Are Government Speech.

While *amici* do not agree with all aspects of Pleasant Grove's argument, the City is undoubtedly correct that the permanent monuments in Pioneer Park are its own speech, not private speech arising in a public forum. The court of appeals thus erred in concluding that Summum has a free-speech entitlement to have its monument permanently displayed in the Park.

A. Government can deliver its own message or use private surrogates to do so.

This Court has recognized across a spectrum of cases that speech is the government's own when the government asserts control over the message's

content — either by crafting the message itself or by commissioning others to do the scripting — even when the message is ultimately delivered by a private individual or entity. Likewise, when government adopts a previously private message, the message becomes that of the government no less than if the government had itself crafted the message.

1. Scripting

Government can, of course, write and deliver its own message. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("When the University determines the content of the education it provides, it is the University speaking"); see also *Bd. of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000) ("If * * * the University and its officials were responsible for [the challenged speech's] content, the case might be evaluated on the premise that the government itself is the speaker.").

But government can also propound a message by scripting it and then hiring private individuals to deliver it. This Court held in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), for example, that "the counseling activities" of doctors working in Title X family-planning clinics "amounted to governmental speech" (*Legal Servs. Corp.* v. *Velasquez*, 531 U.S. 533, 541 (2001) (describing *Rust*)) when the government "defined" the "scope" of that speech (*Rust*, 500 U.S. at 194, 195). See *Rosenberger*, 515 U.S. at 833 (noting that in *Rust*, "the government did not create a program to encourage private speech but instead used private speakers to

transmit specific information pertaining to its own program").[3]

2. Commissioning

But the government need not craft its own messages; it can use private surrogates to do so. This Court held in *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550, 553, 560 (2005), that an advertising campaign designed at Congress's direction by private

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[3] This Court has recognized that, in the Establishment Clause context, the government is responsible for a message that it shapes and presents, even when it does not have exclusive control over scripting the message's content. In *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 302 (2000), for example, this Court held that pre-game prayers written and delivered by students were not private speech where the school tailored the content and presentation. The school district's policy "confine[d] the content and topic of the student's message" (*id.* at 303) and "encourage[d] the selection of a religious message" (*id.* at 307; see also *id.* at 306 (noting that "the only type of message that is expressly endorsed in the text [of the policy] is an 'invocation'")). The school district also controlled the message's "setting" and mode of presentation (*id.* at 308), determining that the invocation would be delivered via the school's public-address system, "as part of a regularly scheduled, school-sponsored function conducted on school property" (*id.* at 307-308). The "extent of school involvement" in the message rendered the pre-game speech attributable to the school district rather than to individual students. *Id.* at 314. *Santa Fe* did not, however, raise a free-speech issue; so while the Court held that the message was attributable to the government for Establishment Clause purposes (*id.*), there was no need to address whether that fact made the invocation fully the government's speech for purposes of the Free Speech Clause. There is similarly no need here for the Court to address that question because Pleasant Grove has not just shaped the items in Pioneer Park; it has created, commissioned, or adopted them as its own.

beef producers (some but not all of whom were appointed by the Secretary of Agriculture) was "the Government's own speech" when the message conveyed was "effectively controlled by the Federal Government itself." In determining that the campaign constituted government speech, this Court relied on the fact that federal officials had established the program, "set[] the overall message to be communicated," "attend[ed] and participate[d] in the open meetings at which proposals [we]re developed," "specif[ied] * * * what the promotional campaigns shall contain * * * and what they shall not," reviewed "[a]ll proposed promotional messages * * * both for substance and for wording," "rejected or rewr[ote]" some proposals, and "exercise[d] final approval authority over every word used." *Id.* at 560-561.

Likewise, when government commissions private sculptors to design monuments — like the Lincoln Memorial, the Vietnam Veterans Memorial, and other monuments on the National Mall — the items constitute the government's own speech. That is so because the commissioning process is designed to give voice to a governmental vision; the government retains both oversight authority and final approval over the result; and the government ultimately assumes physical control of the items — thereby gaining the right to move, modify, or even destroy them. See, *e.g.*, *Serra* v. *United States Gen. Servs. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988) (Newman, J.) (government had right to remove sculpture it had commissioned, artist's objections notwithstanding).

3. Adopting

Government can also choose to adopt as its own a preexisting private message. Recently, in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), this Court evaluated a privately donated Ten Commandments monument that was installed on the grounds of Texas's State Capitol building. Van Orden raised an Establishment Clause claim, not a free-speech one, so while the Court held that the monument's message was attributable to Texas (see *id.* at 686 (plurality) (recognizing display to be official acknowledgment of religion); *id.* at 701 (Breyer, J., concurring) (evaluating message that "the State itself intended")), there was no need to address whether that fact made the monument fully the State's speech for purposes of the Free Speech Clause.[4] But the Ten Commandments monument in *Van Orden* should be understood as having been adopted by the State as its own speech. Cf. *id.* at 692, 695 (Thomas, J.,

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[4] The Establishment Clause applies both to government speech and to private speech endorsed by the government. See *County of Allegheny* v. *ACLU*, 492 U.S. 573, 599 (1989) ("But the Establishment Clause does not limit only the religious content of the government's own communications. * * * Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message."). And the Clause may even in some circumstances limit private speech in a public forum. See *Santa Fe*, 530 U.S. at 303 n.13 ("A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause."); see also *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 772 (1995) (O'Connor, J., concurring) ("I see no necessity to carve out * * * an exception to the endorsement test for the public forum context.").

concurring) (referring to Eagles-donated monument as "Government display[]" and "government speech"). For the monument was marked as having been donated to "the people and youth of Texas" (*id.* at 681-682); it had been officially accepted, and its site selected, by the State (*id.* at 682); it was under the State's physical control (*Van Orden* v. *Perry*, 545 F.3d 173, 181 (5th Cir. 2003), aff'd, 545 U.S. 677 (2005) (explaining that Ten Commandments monument had, in past, been taken down and later reinstalled by State employees)); and there was no indication that the State had generally extended to other private groups the right to erect permanent monuments on the State Capitol grounds.

Recognizing the *Van Orden* monument to be Texas's speech would echo this Court's referring to the creche in *Allegheny* as "the county's * * * display." 492 U.S. at 598. Like the *Van Orden* monument, the creche was marked as having been "donated" to the county by a private organization. *Allegheny*, 492 U.S. at 580. And the county had a practice of allowing the creche to "stand[] alone" (*ibid.*) "for over six weeks" (*id.* at 600 n.50) on "the 'main' and 'most beautiful part' of the building that is the seat of county government" (*id.* at 599) — an entitlement that the county did not extend to others (*id.* at 600 n.50). See also *Pinette*, 515 U.S. at 765 (plurality op.) (describing creche in *Allegheny* as "government speech" while holding that private organization's unattended cross was private speech, not endorsed by government, when displayed in location "open to all on equal terms").

B. Pleasant Grove can assemble the items in Pioneer Park without free-speech scrutiny because they are the City's own speech, not because the City has *carte blanche* to exercise editorial discretion.

The government's own speech "is exempt from First Amendment scrutiny." *Johanns*, 544 U.S. at 553; see also *Velasquez*, 531 U.S. at 541 ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker"); *Rosenberger*, 515 U.S. at 833 ("when the State is the speaker, it may make content-based choices"). That is true, of course, when government itself scripts the speech at issue. But it is equally true when government commissions a private speaker to do so (see *Johanns*, 544 U.S. at 553); and when it adopts previously private speech as its own (see *Allegheny*, 492 U.S. at 600 n.50 (in light of County's provision of preferential access to Grand Staircase, suit did not "raise * * * 'public forum' issue")).[5]

Pleasant Grove has "effectively controlled" (*Johanns*, 544 U.S. at 560) the content of the items in Pioneer Park. In some instances, the City itself created the item. See, *e.g.*, J.A. 170-171, 172 (referencing Pleasant Grove's first City Hall and the gazebo that

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[5] Forum analysis applies when government opens a space for "private speakers [to] convey their own messages" in "a free and robust marketplace of ideas" (*Rosenberger*, 515 U.S. at 835, 850), although that marketplace may be limited to certain topics or certain types of speakers (see *Ark. Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 678-680 (1998)). Forum analysis does not apply to speech, like that at issue here, that the government has itself crafted or adopted.

City created to evoke popular song); see also J.A. 134-135 (describing City-made structure on which donated log cabin will stand). In other instances, Pleasant Grove actively sought out the items in a process akin to commissioning. See, *e.g.*, J.A. 173-174 (explaining that city officials actively sought donation of Fire Station from private individual for placement in park); J.A. 169-70 (explaining that Historical Commission — which was established by mayor and city council[6] — approached developer of land on which Winter Corral sat, to request item for park). In still other instances, the City took official action to adopt the item as its own. See J.A. 123 ("Mayor Cook stated that a letter be written [to] the Fraternal Order of Eagles accepting the monolith of 'The Ten Commandments'"). Pleasant Grove's adoption is, in some instances, declared on the items' face. See, *e.g.*, J.A. 113 (photograph depicting Ten Commandments monument bearing words "presented to the City of Pleasant Grove and Utah County, Utah"); J.A. 115 (photograph showing Nauvoo Temple Stone's engraving, "Donated by John Huntsman"). And the City retains physical control over all the items. See J.A. 159 (Pleasant Grove's Mayor agrees that Eagles would not have right to remove Ten Commandments monument because "the city controls whether or not that monument * * * remains in the park").

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[6] See Pleasant Grove, Pleasant Grove Historic Commission, at http://www.plgrove.org/index.php?option=com_content&task=view&id=2&Itemid=23&limit=1&limitstart=2 (last visited June 17, 2008).

Furthermore, the City has granted each item a unique and prominent governmental platform that is not — and cannot be — made available to all comers. See Pet. App. 1h (access policy noting that "there is a limited amount of park space within the city," that "permanent structures" impede City's efforts to "preserve its public open space," and that City Council should assess "the effect said placement will have on the remaining open space on the public property"). And in some instances, the City has given items a particularly prominent setting within the park. J.A. 123 ("Mayor Cook stated that a letter be written [to] the Fraternal Order of Eagles * * * stating [that Ten Commandments Monument] would be placed in a prominent place in the Rose Garden Park"); J.A. 151 (stating that City moved gazebo in order to position Winter Corral in "ideal place" in park).

Indeed, it is unclear whether a municipality could ever open a forum for permanent monuments, for the very nature of a permanent monument is that its location is forever taken and can never be provided to another item. That simple fact distinguishes permanent monuments from virtually any other kind of speech, including parades, protests, portable artwork, verbal presentations, and even unattended, temporary displays like the one at issue in *Pinette* — all of which appear in locations that can, at other dates and times, be made available to other speakers.

But this Court need not address in this case whether it is possible to open a forum for permanent monuments because Pleasant Grove has not allowed permanent private expression in the park. It has

instead reserved the park for monuments that it has crafted and adopted. So no forum has arisen, even if one were feasible, and the City's choices are "exempt from First Amendment scrutiny." *Johanns*, 544 U.S. at 553.

Pleasant Grove argues that its choices are exempt from free-speech scrutiny not because it created or adopted the monuments in Pioneer Park, but because it exercised editorial discretion in amassing them (see Pet. Br. 26-34), a context in which government communicates its own message (see, *e.g.*, *Forbes*, 523 U.S. at 674). That argument conflates two distinct categories of official action and, in the process, threatens to swallow, wholesale, free-speech jurisprudence as we know it. The Free Speech Clause's principal purpose is to *curb* government's discretion to discourage speech's seeing the light of day. See, *e.g.*, *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130-131 (1981) ("This Court has not hesitated * * * to hold invalid laws which it concluded granted too much discretion to public officials" to inhibit speech). To be sure, there may be some instances, such as the competitive award of excellence-based NEA grants, in which it is "simply inconceivable" for government not to exercise discretion. *Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 586 (1998); accord *United States* v. *Am. Library Ass'n*, 539 U.S. 194, 205 (2003) ("forum analysis and judicial scrutiny are incompatible with the role of public television stations[,] the role of the NEA, * * * [and] the discretion that public libraries must have to fulfill their traditional missions"). But in those situations, exercising discretion to include an

item does not transform the item into the government's own speech: No one would suggest that Karen Finley's chocolate-smeared breasts would have become the government's own speech if the work had been funded. And the Free Speech Clause continues to limit the government's discretion. See, *e.g.*, *Finley*, 524 U.S. at 587 (recognizing limitations on using government subsidy to penalize disfavored viewpoints); *Bd. of Educ.* v. *Pico*, 457 U.S. 853, 870-871 (1982) (recognizing impermissibility of removing books from public-school library in effort to "suppress[] * * * ideas"). Governmental discretion is not, in those instances, "exempt from First Amendment scrutiny," as it would be if the government itself had crafted the speech. See *Johanns*, 544 U.S. at 553. So Pleasant Grove grossly, and dangerously, oversimplifies the issue in this case when it treats the exercise of editorial discretion as transforming included items into government speech in the same way that speech is the government's when the government itself crafts or adopts the message. See, *e.g.*, Pet. Br. at 26-29 (discussing in same breath, and without distinction, *Finley*, *American Library Ass'n*, and *Forbes*, on the one hand, and *Johanns*, on the other).

If Pleasant Grove had done nothing more than to sit back and exercise subjective discretion over requests to place items permanently in Pioneer Park, Summum's free-speech claim would be far stronger, because granting permanent access to a public park is not a context in which avoidance of editorial discretion is "simply inconceivable." *Finley*, 524 U.S. at 586. As described above, however, Pleasant Grove has done much more here than that: It has actively crafted,

commissioned, or adopted the permanent monuments as its own. It is for that reason — not because government gains a *right* of editorial discretion whenever it chooses to *exercise* discretion — that the City's judgments about the items to be installed in the park are unimpeded by the Free Speech Clause.

The City's ability to craft its message is not, however, altogether unfettered: The City remains subject to constitutional provisions that limit the government's speech — the pertinent one being the Establishment Clause. See, *e.g.*, *Pinette*, 515 U.S. at 767 (plurality op.) (Establishment Clause limits "the words and acts of government").[7]

II. The Establishment Clause Provides the Proper Legal Framework for Analyzing Summum's Claim.

Because of the peculiarities of Tenth Circuit jurisprudence, Summum couched its legal claims principally in the language of free speech and viewpoint discrimination. The proper locus of its complaint is, however, the Establishment Clause — which the Founders intended to serve as the principal bulwark against the government's resort to rank

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[7] Although there may be some disagreement among the Justices of this Court over the application of the Establishment Clause to private speech (see note 4, *supra*), even those with the narrowest view of the Clause's reach have acknowledged that the Clause applies to "expression by the government itself," and to "government action alleged to discriminate in favor of private religious expression or activity." *Pinette* 515 U.S. at 764 (plurality op.)

denominational prejudice. And although Summum has yet to develop its Establishment Clause claim and marshal its evidence, there is enough in the record to suggest that Pleasant Grove's conduct may well have had a discriminatory object.[8]

A. The Establishment Clause forbids denominational preferences.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). That conclusion flows inexorably from the Founders' vision.

1. Denominational preferences were anathema to the Founders' view of religious liberty.

While the United States was certainly more homogeneous in 1789 than it is today, the Framers nonetheless inhabited a religiously diverse society. Congregationalists maintained a stronghold in New England; Anglicans dominated religious life in the South; and Quakers influenced society significantly in Pennsylvania. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 45 (2000);

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[8] Summum raised, though it did not press, a claim under the Utah Constitution's Establishment Clause. Pet. App. 4a. It could, of course, amend its complaint to include a federal Establishment Clause claim; but because Utah's Constitution provides more expansive protections than the federal Establishment Clause does, any federal violation would also violate state law. See generally *Manning*, 517 P.2d at 552-553 (Callister, Henriod, and Crockett, JJ., concurring). So for the sake of simplicity, *amici* limit our discussion to the relevant First Amendment precedents.

WINTHROP S. HUDSON, RELIGION IN AMERICA 46 (3d ed. 1981). Even within each colony, diversity abounded: Jews enjoyed a strong presence in Rhode Island; Baptists and Presbyterians in Virginia; and Catholics in Maryland. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421-1430 (1990). By the time the First Amendment was ratified, "the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world." *Id.* at 1421. The Framers thus understood that they were "designing a government for a pluralistic nation — a country in which people of different faiths had to live together." JON MEACHAM, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 101 (2006). "Pluralism was * * * not just a sociological fact for the founders. It was also a constitutional condition for the guarantee of religious liberty." JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 48 (2d ed. 2005) (citing THE FEDERALIST NOS. 10, 51 (James Madison)).

The Founders thus repeatedly emphasized the need to maintain strict governmental neutrality both among sects and in all matters touching on religion. John Adams wrote, for example, that "all men of all religions consistent with morals and property [must] enjoy equal liberty, * * * security of property * * * and an equal chance for honors and power." Letter from John Adams to Dr. Price (Apr. 8, 1785) (quoted in WITTE, *supra*, at 49). George Washington affirmed that "the government of the United States * * * gives to [religious] bigotry no sanction, to persecution no assistance." Letter from

George Washington to the Jews (Aug. 18, 1790), in THE SEPARATION OF CHURCH AND STATE: WRITINGS ON A FUNDAMENTAL FREEDOM BY AMERICA'S FOUNDERS 110 (Forrest Church ed., 2004). Similarly, Thomas Jefferson extolled Virginia's passage of his Bill for Religious Freedom — which "had the same objective and w[as] intended to provide the same protection against governmental intrusion on religious liberty" as the federal Establishment Clause (*Everson* v. *Bd. of Educ.*, 330 U.S. 1, 13 (1947)) — as "proof that [the people] meant to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination" (THOMAS JEFFERSON, WRITINGS 40 (Merrill D. Peterson ed., Library of Am. 1984)).

And no one was more committed to this principle than the chief architect of the First Amendment, James Madison. In opposing Patrick Henry's proposal that Virginia fund "Teachers of the Christian Religion," Madison thoroughly denounced all denominational preferences: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 3 (1785), reprinted in *Everson*, 330 U.S. at 63-72 (appendix to dissent of Rutledge, J.). "A just government," he declared, is "best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another." *Id.* ¶ 8.

2. This Court has consistently recognized the strict prohibition against denominational preferences.

True to the Framers' intent, "[i]n * * * Establishment Clause cases [this Court has] often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) (citing cases). Time and again, this Court has recognized that "the Constitution * * * mandates * * * tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984).[9] Thus, while this

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[9] See, *e.g.*, *McCreary*, 545 U.S. at 876 ("The Framers and the citizens of their time intended * * * to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate"); *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 703 (1994) ("a principle at the heart of the Establishment Clause" is "that government should not prefer one religion to another"); *Wallace* v. *Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The [Establishment] Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others."); *Larson*, 456 U.S. at 246 ("'fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief'" (quoting *Sch. Dist.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring))); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970) ("basic purpose" of Religion Clauses "is to insure that no religion be sponsored or favored, none commanded, and none inhibited"); *Epperson* v. *Arkansas*, 393 U.S. 97, 103-104 (1968) ("Government * * * may not be hostile to any religion * * * and it may not aid, foster, or promote one religion or religious theory against another"); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects." (quoted in *Larson*, 456 U.S. at 246)).

Court has also routinely recognized Establishment Clause protections beyond the prohibition against denominational preferences,[10] even those who take the narrowest view of the Clause's reach support the application of the Clause to forbid religious favoritism.[11]

Indeed, so central is this principle to the First Amendment's framework for safeguarding religious liberty that it informs this Court's jurisprudence under *both* Religion Clauses. As the Court explained in *Larson*, the "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause"

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[10] See, *e.g.*, *McCreary*, 545 U.S. at 860 (holding that it is impermissible for government to "'send[] the . . . message to . . . nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members. . . .'" (quoting *Santa Fe*, 530 U.S. at 309-310 (citation omitted))); *Grumet*, 512 U.S. at 703 ("a principle at the heart of the Establishment Clause [is] that government should not prefer * * * religion to irreligion"); *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992) ("at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise").

[11] See, *e.g.*, *Wallace* 472 U.S. at 98 (Rehnquist, J., dissenting) (recognizing that Founders aimed to prevent imposition of national religion and discrimination among sects, while doubting that Madison also sought to prevent discrimination against nonreligion). But cf. *McCreary*, 545 U.S. at 893 (Scalia, J., dissenting) (acknowledging rule against denominational preferences "where public aid or assistance to religion is concerned" and "where the free exercise of religion is at issue," but arguing that it protects only monotheistic faiths with respect to "public acknowledgment of the Creator").

because "[f]ree exercise * * * can be guaranteed only when legislators — and voters — are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." 456 U.S. at 245-246 (citing *Ry. Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally")).[12]

In short, while some questions about the scope of the Religion Clauses may divide constitutional scholars and jurists, there can be no serious doubt that the Establishment Clause proscribes denominational preferences.[13] And that principle must remain inviolate

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[12] See also *Locke* v. *Davey*, 540 U.S. 712, 725 & n.8 (2004) (upholding, under Free Exercise Clause, scholarship program excluding devotional-theology students, where nothing in program's history, text, or operation suggested religious animus and program did not "'single out' anyone for 'special burdens'" on basis of religion); *Lukumi*, 508 U.S. at 532 (just as Establishment Clause bars official disapproval of any sect, "protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"); *Gillette* v. *United States*, 401 U.S. 437, 449 n.14, 452-453 (1971) (facially neutral selective-service statutes' discriminatory impact on religious sects did not violate Establishment or Free Exercise Clauses because no discriminatory object); *Fowler* v. *Rhode Island*, 345 U.S. 67, 69-70 (1953) (First Amendment requires allowing Jehovah's Witnesses to preach publicly on same terms as other religious groups and prohibits "preferring one religion over another" and disfavoring "unpopular group").

[13] The principle extends even beyond the First Amendment's Religion Clauses. It finds expression, for example, in the no-

in order both to "carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society" and to maintain religion "as a matter for the individual conscience, not for the prosecutor or bureaucrat." *McCreary*, 545 U.S. at 882 (O'Connor, J. concurring).

B. When government acts with religious animus, it stigmatizes the disfavored minority and threatens religious liberty.

Denominational preferences are so inimical to our constitutional order that this Court has looked to race-discrimination jurisprudence as the source for the applicable legal standard: "[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson*, 456 U.S. at 246;[14] accord

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religious-test clause, which ensures that no sect may ever have a monopoly on the offices or emoluments of government. See U.S. Const. Art. VI; *Torcaso* v. *Watkins*, 367 U.S. 488, 495 n.10 (1961) (In debating passage of Article VI, James Iredell stated, "'[i]t is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?'").

[14] Reflecting the Founders' particular disdain for sectarian preferences, this Court explained in *Larson* that the more relaxed *Lemon* test was "intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions * * * that discriminate *among* religions." 456 U.S. at 252. The Court has subsequently noted: "*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether

Employment Div. v. *Smith*, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race * * * so too we strictly scrutinize governmental classifications based on religion."); see also *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976) (per curiam) (race and religion are "suspect distinctions" under Equal Protection Clause). That is because the Religion Clauses and "the Equal Protection Clause as applied to religion[] all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Grumet*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in judgment).[15]

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the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon* * * *." *Hernandez* v. *C.I.R.*, 490 U.S. 680, 695 (1989). The different tests do not, however, yield different outcomes: A governmental act "born of [religious] animus" also fails *Lemon*. *Id.* at 696.

[15] See also *Lukumi*, 508 U.S. at 540 (Kennedy, J.) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."); *Walz*, 397 U.S. at 696 (Harlan, J., concurring) ("Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."); cf. *Gillette*, 401 U.S. at 449 n.14 (challenges to conscientious-objector law brought under Equal Protection and Religion Clauses addressed together because they were "not * * * independent argument[s]").

Thus, in religion cases as well as race cases, laws that appear facially neutral but are nonetheless tailored to advance a discriminatory purpose are invalid. Compare *Lukumi*, 508 U.S. at 534 (both Establishment and Free Exercise Clauses "extend[]

That the constitutional analysis is the same follows from the fact that the injury is analogous: Governmental action rooted in irrational prejudice "denigrates the dignity" of the disfavored racial or religious group by placing on its members "'a brand * * *, affixed by the law, an assertion of * * * inferiority.'" *J.E.B.* v. *Alabama ex rel T.B.*, 511 U.S. 127, 142 (1994) (quoting *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879));[16] see also *Larson*, 456 U.S. at 254-255 (striking down state statute treating some

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beyond facial discrimination"), and *Gillette*, 401 U.S. at 452 ("The question of governmental neutrality is not concluded by the observation that [a statute] on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses."), with *Shaw* v. *Reno*, 509 U.S. 630, 644 (1993) (redistricting legislation, though "ostensibly neutral," was "so bizarre on its face" that it was "an obvious pretext for racial discrimination").

[16] Accord, *e.g.*, *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."); *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991) (equal protection concerned with preventing race-based "stigma or dishonor"); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (racial classifications cause "stigmatic harm" and undermine right of all "to be treated with equal dignity and respect"); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 625 (1984) ("stigmatizing injury" caused by race- and gender-based discrimination "deprives persons of their individual dignity"); *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

denominations more favorably than others where statute's legislative history revealed hostility toward "Moonies"). For while conduct that is facially neutral and only incidentally places a special burden on a particular group may be permissible (see, *e.g.*, *Smith*, 494 U.S. at 883; *Washington* v. *Davis*,426 U.S. 229, 242 (1976)), when government acts on "irrational prejudice" (*City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 449-450 (1985)) — "'because of,' not merely 'in spite of,'" that disparate impact (*Lukumi*, 508 U.S. at 540 (Kennedy, J.) (quoting *Pers. Adm'r* v. *Feeney*,442 U.S. 256, 279 (1979))) — it inflicts an unconstitutional dignitary injury on the members of the disfavored group.[17] Religion plays so central a role in civic as well as personal identity in American society that when government associates itself with, or expresses a preference for, any denomination, it marks those of other faiths with a badge of inferiority just as insidious as when government prefers one race to another.

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[17] The Court has recognized this principle in a wide range of contexts. See, *e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003) (striking down antisodomy statute as embodying anti-gay prejudice); *Romer* v. *Evans*, 517 U.S. 620, 632 (1996) (striking down state constitutional provision barring extension of antidiscrimination protections to gay men and lesbians as "inexplicable by anything but animus toward the class it affects"); *Cleburne*, 473 U.S. at 448, 450 ("mere negative attitudes, or fear * * * are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like"; they reflect only "an irrational prejudice"); *USDA* v. *Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 126-128 (2007). For religion, like race, is such a critical "marker[] of social division" that official denominational preferences effectively perpetuate a religiously based social-caste system. *Id.* at 127-128.

That is so even when the tangible effect of the differential treatment is minimal. *Id.* at 128 (comparing harms from religious endorsements to harms that Justice Harlan identified in *Plessy* v. *Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting), where although separate-but-equal railway cars may not have interfered with passengers' ability to reach their final destinations, segregation nonetheless marked blacks as "so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens"). So although the tangible effect of any religious animus here may be only to deprive Summum of a governmental platform to propagate its views, that fact does not immunize Pleasant Grove's conduct to Establishment Clause challenges any more than if the City had enacted a policy of displaying Christian monuments but not Hindu or Scientologist ones.

But the harm caused by sectarian religious animus is not stigma alone. It is, more generally, the religiously based strife that is bound to result when the animus remains unchecked — a threat that the Founders sought to guard against:

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife,

> and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.

Everson, 330 U.S. at 8-9; see also Madison, *Memorial and Remonstrance* ¶ 11 ("Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.").

The Founders' aim was not simply to avoid theocracy (cf. THE FEDERALIST NO. 10 (James Madison) (observing that multiplicity of political factions ensures that none attains dominion over others)), but also to safeguard complete freedom of conscience by fostering a marketplace of religious beliefs akin to the Free Speech Clause's marketplace of ideas: "Madison's vision — freedom for all religion being guaranteed by free competition between religions — naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of

official denominational preference." *Larson*, 456 U.S. at 245.[18]

Thus, in order to evaluate Summum's real claim in this case — that Pleasant Grove acted with religious animus in refusing to display the Seven Aphorisms — it will be necessary for the parties to adduce, and the reviewing courts to consider, evidence about the City's actions, including the historical background of the decision being challenged, the series of events leading to that decision, the administrative history, and contemporaneous statements made by the decisionmakers, all of which are "objective factors [that] bear on the question of discriminatory object." *Lukumi*, 508 U.S. at 540 (Kennedy, J.).

C. There is reason to suspect that Pleasant Grove acted with religious animus.

Because of the way that Tenth Circuit law distorted the parties' litigation of this case, there is only a limited record on whether Pleasant Grove acted with religious animus in denying Summum's request to display the Seven Aphorisms. But there is already enough to suggest that the object of Pleasant Grove's

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[18] Perhaps the parallels between the conceptions of religious competition and competition among expressive viewpoints may help explain why the Tenth Circuit turned to free-speech jurisprudence to fill the gap in its Establishment Clause jurisprudence wrought by *Anderson*. But because the Religion Clauses absolutely prohibit government's weighing in on religious questions or affording special recognition to any denomination's views, whereas the Free Speech Clause forbids only government's distorting or silencing private speech, the fit was bound to be imperfect, thus leading to the odd result here.

actions may not have been pure, and that Summum may therefore have a viable Establishment Clause claim.

For decades Pleasant Grove accepted and erected monuments in Pioneer Park without passing an access policy. Only after Summum persisted in its efforts did the City propound a policy — one that, perhaps not coincidentally, screened Summum out.

The City claims that the policy *requires* it to reject Summum's request because Summum's proposed monument does not "directly relate to the history of Pleasant Grove." J.A. 61. But if the access policy sets forth mandatory requirements, the City has not followed its own rules. For nothing either on the face of the Ten Commandments monument or elsewhere in the record suggests any connection between that monument and the City's history. Cf. Pet. App. 2h-3h ("item must directly re[illegible]te to the history of Pleasant Grove and have historical relevance to the community"). In other words, even if the Decalogue itself had any connection to Pleasant Grove's history, *this* Ten Commandments monolith does not. The monument was not, for example, "at least fifty years old" when accepted; it was not "directly associated with events of historic significance in the community"; and it did not "exhibit significant methods of construction * * * used within the historic period." Pet. App. 3h. When donated, it was a contemporary creation, not a historical relic.

And even if the Ten Commandments monolith had been a historical relic, the policy also requires that monuments be donated by "an established Pleasant

Grove civic organization with strong ties to the community" or an individual with "a historical connection to Pleasant Grove City." Pet. App. 2h. Because Pleasant Grove's Eagles aerie was barely two years old when the City accepted the donation (see Pet. App. 2a-3a), the monolith fails that requirement too.[19] Discovery may reveal an equally poor fit between the policy and other items in the park.

The timing of the policy's issuance, combined with the policy's all-too-convenient exclusion of Summum and questionable applicability to other monuments, suggests that Pleasant Grove may have engaged in "religious gerrymandering" by drafting and interpreting its rules for donated displays "with the explicit intention of including particular religious denominations and excluding others." *Larson*, 456 U.S. at 254-255; accord *Lukumi*, 508 U.S. at 540 (Kennedy, J.).[20]

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[19] The City attempted to justify the Ten Commandments' inclusion by claiming that the access policy allows for monuments that are historically relevant *or* were given by a qualifying organization, notwithstanding the policy's plain language (which presents the requirements as conjunctive). See J.A. 188-189. The City's strained reading to save the Ten Commandments while excluding Summum provides further evidence that the object of the City's actions may be improper.

[20] The Establishment Clause violation — if one occurred — was Pleasant Grove's discriminatory treatment of Summum, not its failure to speak in Summum's voice. So the remedy would not necessarily be to require Pleasant Grove to erect the Seven Aphorisms. It would be up to the district court to craft a suitable remedy in the first instance, taking into account whether Pleasant Grove's display of the Aphorisms would itself violate the Establishment Clause and whether damages or other remedies might make Summum whole.

CONCLUSION

This Court should reverse the judgment below, clarifying in the process that the Establishment Clause, not the Free Speech Clause, provides the proper framework for adjudicating Summum's claims of denominational preference and religious animus.

Respectfully submitted.

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APPENDIX

APPENDIX A

DESCRIPTIONS OF THE *AMICI*

American Jewish Committee

The American Jewish Committee, a national organization of approximately 175,000 members and supporters and 32 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans. AJC believes it is critically important to the well-being of a pluralistic society that government not be permitted to favor some religions to the detriment of others. Such favoritism, as this Court has previously recognized, is contrary to our constitutional tradition and the great American experiment.

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases decided by this Court and the lower federal and state courts nationwide.

Anti-Defamation League

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races to combat racial, ethnic, and religious prejudice in the United States. Today ADL is one of the world's leading organizations fighting anti-Semitism, hatred, discrimination, and all forms of bigotry. ADL believes that its stated goals, as well as the general stability of our democracy, are well-served through strict separation of church and state and commensurately strict enforcement of the Free Exercise Clause.

ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: "[A] union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962).

Baptist Joint Committee for Religious Liberty

The Baptist Joint Committee for Religious Liberty is a 70-year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. The BJC deals exclusively with religious-liberty and church-state-separation issues, and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to ensuring religious liberty for all Americans. The BJC has participated as an *amicus curiae* in many of the major religious-liberty cases before this Court.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases concerning religious liberty and the separation of church and state. PFAWF has joined in filing this *amicus curiae* brief in order to help ensure the continued vitality of the First Amendment principle that government must not be permitted to favor one religion over another.

AMICUS CURIAE BRIEF

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No. 07-665

IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL.,
Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT

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AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT[1]

INTEREST OF THE *AMICUS*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jews. It believes that the well-being of the Jewish community is dependent on a rigorous policy of government non-discrimination between faiths as well as a vibrant marketplace of ideas. It also believes that government speech must be subject to different rules than those that govern state regulation of private speech, lest every extremist group claim the right to speak in government's name.

The brief is filed with written leave of the parties.

SUMMARY OF ARGUMENT

1. Because existing law recognizes only two categories of speech in pubic *fora*—purely private and purely governmental speech—the parties litigated and the court below decided this case on

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, or its members, or counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

that biaxial model. That model, however, does not adequately reflect the spectrum of ways in which private and government speech interact.

2. In some cases—and in this one—government and private speakers speak simultaneously, expressing a common idea toward a common end. Each speaker seeks not only to speak, but to enjoy the benefit of speaking together with its partner. Such hybrid speech deserved to be treated as a separate category for purposes of determining an entitlement to access to public places

3. Pleasant Grove City sought not only to speak on its own behalf, but to associate itself with the speech of the Fraternal Order of Eagles. For its part, the Eagles wanted to send its message not only under its own auspices, but under the auspices of local government.

The Eagles designed this monument along the lines of some 150 others displayed around the nation (and tens of thousands of paper copies). The message was aimed at an evil (juvenile delinquency) identified by the Eagles. The text of Ten Commandments displayed on the monument was the product of an inter-faith committee convened by the Eagles.

4. The Ten Commandments monument which triggered this litigation is a textbook example of hybrid speech. It sits where only government speech has been permitted; title resides in the City; and the City pays maintenance costs, But in every other

way—from design to the message's identification with the Eagles, this is also the Eagles' speech.

5. Thus, while Petitioners and Respondent are correct about what should follow if its characterization of speech as public or private is correct, neither characterization of the speech here is entirely accurate.

6. The bare fact that legal title is in the City is not inconsistent with sending a joint message from the monument, just as a private party being a state actor for some purposes does not convert it into an arm of government for all purposes.

7. In hybrid cases, while there is sufficient governmental action to subject its speech to constitutional limits, notably the Establishment Clause, the governmental aspects of the case do not overwhelm and obscure the concurrent private speech aspects.

8. *Johanns v. Livestock Marketing Assoc.*, 544 U.S. 550 (2005), emphasized that the generic "consumer beef" advertisements for which beef producers were taxed were "from beginning to end" government speech. The content was prepared by a body whose members were all government employees or appointees. The content of the advertisements were dictated by statute. No private person was identified with the message. Hence, the Court found treated the advertisements as government speech.

9. This *Johanns* Court reserved the question of whether the same result would obtain if certain

individuals were compelled to identify with the government's message. 554 U.S. at 564-65. That reservation defeats Pleasant Grove City's efforts to invoke *Johanns*—a government speech case—as controlling in this very different hybrid case.

10. *Wooley v. Maynard*, 430 U.S. 705 (1977) is also a hybrid speech case. The state motto to which Wooley objected was undoubtedly government speech. Its display on his car, though, retained a private character, sufficient to give rise to a coerced speech claim.

11. In other contexts which are in fact hybrid situations, courts have needlessly and futilely struggled to label speech as exclusively private or public.

12. Among the most common hybrid cases are those involving specialty ("affinity") license plates, on which a group places its motto, and vanity license plates, where individuals pick identifying letters and numbers to communicate some message. In those instances, private speech (the personalized aspect of the plate) is married to government speech (the information that identifies the car). Courts have struggled to label these plates as either private or public speech, creating complex tests leading to a crazy-quilt pattern of holdings.

13. In the case of legislatively created specialty plates for an anti-abortion group, but not their ideological opponents, the Fourth and Sixth Circuits have reached conflicting decisions about the identity of the speech as official or unofficial.

14. The hunt for an either/or characterization of affinity plates is as misguided as the parallel effort here.

15. The sharp dichotomy between public and private speech arose in the public forum cases, where the speaker seeks nothing from government but access to its property. Those speakers seek not government's endorsement, but the convenience, visibility and accessibility of publicly owned spaces. For this reason, private religious speech in a public forum poses no Establishment Clause problem because no government endorsement is sought or given.

16. By contrast, in hybrid speech cases, the private speaker seeks not only to speak, but to enjoy government's endorsement. Conversely, government seeks not only to speak in its own name, but to benefit from association with a respected private group.

17. The hybrid category will generally not be applicable when government hires a private group to deliver the government's own message, as was the case in *Rust v. Sullivan*, 500 U.S. 173 (1991). But outright viewpoint discrimination in the choice of speakers acting in tandem with, but not at the behest of, government, ought to be unconstitutional.

18. Pleasant Grove's rules for accepting displays underscore the City's ratification of Eagles speech, as they permit displays only from organizations with a long-standing relationship to the City, a criterion

relevant only if the Eagles are concomitantly speaking with the City.

19. This case presents an opportunity to begin to craft rules for hybrid cases. Following is a list of a first-cut at enumerating such rules:

(a) Rules must be in writing and promulgated in advance to avoid obscuring improper and standardless discretion;

(b) Broad content-based rules (*e.g.*, monument must relate to local affairs, or must relate to an event occurring a specified number of years in the past) are acceptable because of the presence of government speech.

(c) Outright viewpoint discrimination would be impermissible, given the presence of private speech.

20. Pleasant Grove City proffered two rules as justifying accepting the Eagles' Ten Commandments but excluding Summum's aphorisms. The first required a "long-standing relationship" between the City and the group seeking to "donate" a monument. In this case, that rule is a pretext. The Eagles existed in Pleasant Grove City for only two years prior to the City's acceptance of their monument. By any fair use of the English language, this is not long-standing (especially when all but one of the remaining park exhibits illustrates 19th century events).

The second rule required monuments to relate to local history. With the exception of a 9/11 monument commemorating a singular event (and, perhaps, a

recreation of a Mormon sacred building located in Illinois), all the displays in the park did so. There is no indication that the Ten Commandments had some unique impact on Pleasant Grove City as opposed to whatever role they play in American society generally.

ARGUMENT

I. THIS COURT SHOULD RECOGNIZE A CATEGORY OF SPEECH WHICH IS BOTH PUBLIC AND PRIVATE

A. The Biaxial Approach To Speech—Either Public Or Private—Inadequately Accounts For Intermediate Hybrid Cases

Petitioners and the Respondent agree on three principles relevant to the disposition of this case. Government (a) must treat all private viewpoints equally, whether in directly regulating speech or deciding on a speaker's access to a public forum of any sort; (b) must not itself speak in ways that express a preference for one faith over others; but (c) need not be viewpoint neutral when it speaks wholly for itself. Each of these principles is predicated on the existence of a sharp line between public and private speech. Existing precedents do not recognize an intermediate, hybrid category in which government and private party speak in tandem to their mutual advantage.

Standing alone, each of these three principles is sound. In this case, however, they fall short of

leading to a satisfactory result—not because any of them are unsound standing alone or in combination, but because the either/or paradigm of all public or private speech is false, or, more precisely, greatly over-simplified. It does not accurately reflect the full range of interactions between private parties and government in regard to speech, nor does it permit appropriately nuanced judicial responses.

This is not to say that there are no clear-cut cases. In some cases speech is either purely private or purely public. Compare, *e.g.* *United States v. American Library Ass'n*, 539 U.S. 194 (2003); *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005)[2] (public speech), with *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (private speech). But some speech is both, a hybrid, at once deliberately public and private.

The current legal regime does not account for such middle ground cases. To treat this third category as if only one party was speaking, instead of the speech being the simultaneous expression of official and private speakers, is to distort both the character of the speech and the law.

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[2] See also *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 61, n.4 (2006) (military recruiters' on-campus speech was wholly government speech).

B. In Hybrid Cases, The Speech Is Deliberately Both Public And Private

The Pleasant Grove City Ten Commandments monument falls easily into this intermediate hybrid category. It is neither exclusively public nor exclusively private. It is, by the deliberate choices of the Eagles and the City, the joint speech of both. The Ten Commandments display would not achieve its full purpose for either if the City or the Eagles spoke only for itself. The entire point of the enterprise is for the City and the Eagles to speak with one voice.

The government wants not only to speak on its own behalf, but to endorse and amplify the Eagles' own religious speech and to bask in the reflected glory of a nationally respected group. The Fraternal Order of Eagles, for its part, is interested in having the City amplify and bless its speech with an official imprimatur, all the while retaining its own distinct voice.

Notwithstanding this state of affairs, the parties litigated this case below within the traditional biaxial framework. Each accepted that the only relevant decisional categories were public or private. That was a legitimate litigation strategy given the precedents. It is not a sound basis for decision by this Court.

Pleasant Grove City's position is simple enough. "In analyzing Summum's assertion, the first question must be whether this case is about private speech or government speech." [Petitioners' Brief at 21 (emphasis added).] The City insists that the

speech at issue is wholly its own, and that Summum's claims are entirely insubstantial.

If its minor premise were correct, Pleasant Grove City's legal conclusion would be unassailable. This Court has repeatedly rejected the proposition that the First Amendment requires government to provide the means for citizens to disagree with its own speech. Challenges to government's speech are worked out at the ballot, not the courthouse. See *e.g.*, *American Library Association v., supra*; *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). M. Yudoff, When Government Speaks (1983). The problem is that the monument is not exclusively official speech.

Summum for its part argued below that the monument was purely the Eagles' private speech, and that the City's decision to exclude Summum's own competing monument while accepting the Eagles' was impermissible viewpoint based discrimination against private speech. The problem with this proposition, too, is in its minor premise. The Ten Commandments monument is not merely private speech.

The judges on the divided court below found themselves enmeshed in the same constricted method of analysis: was the monument public or private speech? See, 483 F.3d 1044 (10th Cir. 2007) (panel opinion) (private speech); 499 F.3d 1170, 1181 (Lucero, J., dissenting from rehearing en banc); *id.* at 1175 (McConnell, J., same); *id.* at 1178 (Tacha, J.) (concurring in denial of rehearing *en banc*).

Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005), hints at the existence of a third category of speech, a category which should govern here: hybrid—public and private—speech.

This Court should take its own hint and add a new hybrid category to the courts' analytical arsenal. Full recognition of that additional category is appropriate both because it would accurately reflect complex realities and because it will lead to principled and precise decision-making.

II. PLEASANT GROVE CITY'S TEN COMMANDMENTS MONUMENT BEARS OVERLAPPING CHARACTERISTICS OF GOVERNMENT AND PRIVATE SPEECH

Summum, true to the either/or categorization under which it litigated below, argued that the original private sponsorship of Pleasant Grove City's Ten Commandments monument by the Fraternal Order of Eagles wholly overrode the evident public elements embodied in the City's acceptance of title to, and display of, the monument, and that it remained therefore wholly private speech. This is too simplistic an approach to assessing the nature of the speech at issue.

By accepting the Eagles designed monument into its park, a place where private parties cannot erect permanent structures at will, and by accepting title and ownership to the monument, the City did more than merely allow access for someone else's private speech. It adopted that speech as its own.

This conclusion is strengthened because the City asserts on-going responsibility for maintaining the monument, [Petitioners' Brief at 3], a responsibility it would not bear with regard to a purely private display. A municipality is not legally obligated to maintain a privately erected temporary holiday display merely because it stands on public land. Cf. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Conversely, however, it cannot accurately be said that the bare fact of the City's title to the monument silences the Eagles' voice and obscuring its large hand in shaping the monument's message. Ownership of the physical monument is not inconsistent with sending a joint message.

Contrary to Pleasant Grove City's argument, the City did not seek to speak only for itself. It sought to join with the Eagles in speaking. The arrangements here are, to borrow a term from family law, an open adoption, not a closed one. Cf. *In Re: Guardianship of K.M.O.*, 161 N.J. 337, 736 A.2d 1246 (1999).

In the run-of-the-mill public forum case, government is asked to allow property it holds in trust for the public to be used as a platform for private speech. No governmental endorsement is sought, given or reasonably perceived. *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

In *Pinette*, as in most public forum cases, the challenge to access came from government. In that

case Ohio was anxious not to be associated with the speech of a racist group. Likewise, in *Good News*, the Milford School District was anxious not to be aligned with Good News' religious message. In neither case did government affirmatively endorse the private speaker's sectarian message.

Pleasant Grove City is anxious to be associated with both the speech emblazoned on the Eagles' Ten Commandments monument and with the Eagles. True, the City's association with the Eagles and the Eagles' speech means that it must meet constitutional restrictions on official public speech, notably the Establishment Clause. Judge McConnell acknowledged as much in dissent from the denial of rehearing *en banc*. But that does not exhaust Pleasant Grove City's constitutional responsibilities, because of the monument's co-existing private speech.

Van Orden v. Perry, 545 U.S. 677 (2005), addressing another Eagles monument donated to a government body, is not to the contrary. That decision establishes only that a donated Eagles Ten Commandments monument is sufficiently governmental to be subject to the Establishment Clause, not that it is exclusively governmental speech. The latter issue was neither raised nor decided in *Van Orden*.

One can be a state actor without losing one's overall private status. The fact that conduct is state action or under color of law does not mean that the private party so acting is in all respects a government actor.

State action is present when "a private actor operates as a 'willful participant in joint activity with the state.'" *Brentwood Academy v. Tenn. Secondary School Athletic* Ass'n, 531 U.S. 288, 295 (2001). That this Court describes such activity both as "private" and "joint" demonstrates there is nothing incoherent about that dual status. A defense lawyer's use of race-based peremptory challenges is state action, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); his malpractice in the same case is not, *cf.*, *Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender not state actor for malpractice purposes).

The entire point of a new hybrid speech category is exactly that each speaker retains its own character, such that rules developed for both public and private speech need to be taken into account in assessing the nature of the speech.

III. This Court Should Take This Opportunity To Recognize A Category Of Hybrid Speech

A. *Johanns* Presages The Recognition Of Hybrid Speech

The existence of a hybrid category of speech, neither public nor private, is presaged by *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), a case unsuccessfully challenging a tax on beef producers to pay for generic advertisements urging beef consumption. Ranchers opposed to generic advertising asserted that the tax they paid to support the campaign was unconstitutional

government coerced speech. *Cf. Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943).

Johanns limned the parameters of the "relatively new and correspondingly imprecise" government speech doctrine, *Johanns*, 544 U.S. at 573 (Souter, J., dissenting). It reaffirmed the broad leeway accorded government itself to favor some viewpoints over competing ones when speaking exclusively on its own behalf. The majority acknowledged, however, that several questions remained open about the outer boundaries of the doctrine.

A question raised but not answered in *Johanns* was the status of governmental speech concomitantly perceived as, or in fact also attributable to, an identifiable unwilling private speaker. Does that joint speech constitute coerced private speech despite the fact that it retains its governmental character? 554 U.S. at 564, n. 7; *id.* at 564-65. That question assumes the possibility of speech which is neither exclusively public nor exclusively private, but both—precisely the situation here presented for decision.

Johanns did not reach that question. There was no proof that the Beef Advisory Board's speech was viewed in part as that of an identifiable individual. "We have only the funding tagline itself ... that, standing alone, is not sufficiently specific to convince a reasonable fact-finder that any particular [producer] ... would be tarred with the content of each trademarked ad." 544 U.S. at 566.

Given *Johanns'* reservations, Pleasant Grove City's reliance on *Johanns* as dispositive [Petitioners' Brief at 29-31] is misplaced. The care *Johanns* took to paint the speech as from "beginning to end the message established by the Federal government." 544 U.S. at 560, belies the claim that it is controlling here.

In *Johanns*, "the government set[ ] the overall message to be communicated, and approve[d] every word that [was] to be disseminated." *Id.* at 562. And not just at the end of the process. "Government officials over[saw] every step of the process; the statute itself lays out the broad criteria and aim of the government's speech." The persons who supervised the ad campaign were either federal employees or private persons appointed or removable by the Secretary of Agriculture. *Id.* at 560.

If a concurrent overlay of private speech had been present in *Johanns*, "the analysis would be different," *id.* at 562, n. 7, even though technical "ownership" of the speech would have been the same.

The suggestion that a hybrid category exists garners further support from *Wooley v. Maynard*, 430 U.S. 705 (1977), holding that New Hampshire could not require drivers to display the state motto ("Live free or die") on a license plate. An official state motto is undeniably state speech. Its display on a private car necessarily is also private speech, or the holding in *Wooley*—that the state could not insist on the motto's display on a license plate whose display it may require—makes no sense. *Wooley* rests on the assumption that in some contexts license plates at

once have elements of official speech and private speech.

B. Other Frequently Encountered Circumstances Better Fit A Hybrid Category Than Stark Public/Private Categories

Wooley and this case are not outliers, not justifying the creation of an additional analytic category.[3] The problem arises in other contexts,

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[3] The mix of *amici* supporting Petitioners is, however, unusual, combining those who have long defended the display of most religious monuments both by government and on government property with those opposing all, or almost all, such displays. For the former, support for Pleasant Grove City means that it is likely that only conventional (Judeo-Christian) monuments will be displayed, as governments are unlikely to accept displays from unpopular religious groups. Most of the latter would prefer that there be no religious monuments in public places. They believe, however, that, given *Van Orden*, the policies behind the Establishment Clause are best served by adopting a rule that limits the number of permanent religious displays in public parks, even as it tolerates Ten Commandments monuments.

AJCongress unsuccessfully urged that *Van Orden* be decided in favor of Van Orden. This Court disagreed. In these circumstances, *amicus* AJCongress believes that there is far less risk of a government endorsement of religion if more religious symbols are allowed than if a central symbol of the "Judeo-Christian" tradition is all that government chooses to display, invoking some (perhaps dubious) secular rationale.

including the issuance of vanity and affinity group plates. It has likewise arisen in connection with private group sponsorship of public broadcasting by a racist group, *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000). Absent a category that accurately reflects their complexities, the courts have struggled to analyze those cases. They have jerry-built amorphous, multi-part tests to delineate a non-existing boundary between the public and the private.

The Ninth Circuit recently observed with some asperity in a hybrid speech case, that "there is some question as to what standard we should apply in differentiating between public and private speech," *Arizona Life Coalition v. Stanton*, 515 F.3d 956, 963 (9th Cir. 2008).

The results are unsurprisingly uneven and unpredictable, given the absence of fit between the legal rubrics and reality. The problem is mostly not with the tests, nor the difficulty of distinguishing public from private speech. The problem is the refusal to acknowledge the existence of a hybrid category.

A review of the license plate cases illustrates the importance of forthrightly recognizing a hybrid category. Many states now issue upon individual request various vanity or affinity group license plates. See, e.g., S. Lonce, *Free Speech on Wheels*, New York Times (July 5, 2008). The former involves the car owner selecting a personalized combination of letters and numbers expressing a personal

message (*e.g.*, GUNNUT; John 3:16; GOMETS) as a substitute for a random selection of identifying letters and numbers. The latter involves an organization placing its symbol or slogan, or both, on a license plate available for purchase by members and supporters (Choose Life; Preserve Choice; VFW).

The vanity plate always reflects a personal, private choice. Affinity or specialty group plates are created either by a special act of the legislature, or by a sufficient number of persons expressing an interest in the creation of a "specialty" or "affinity" plate. Tenn. Code Ann. 55-4-306; Va. Code Ann. § 46.2-746.22; SC. Code Ann. 56-3-8190.

The federal and state courts have repeatedly confronted disputes over these plates:

> (1) When the state excludes a particular message from an individual's vanity plate because it is religious, see *Pruitt v. Wilder*, 840 F.Supp. 414 (E.D. Va. 1994) (invalidating ban on references to a deity as viewpoint discrimination); *Byrne v. Terrill*, 2005 W.L. 2043011 (D. Vt. 2005) (upholding exclusion of reference to John 3:16); or offensive on some real or imagined ground: *Lewis v. Wilson*, 253 F.3d 1073 (8th Cir. 2001) (requiring issuance of Aryan-1 plate); *Perry v. McDonald*, 280 F.3d 159 (2nd Cir. 2001) (upholding refusal to issue SHTHPNS plate); *Higgins v. Driver & Motor Vehicles Service Branch*, 335 Or. 481, 72 P.3d 628 (2003) (upholding ban on reference to alcohol); *Martin v. State*, 175 Vt. 80, 819 A.2d 742 (Vt. 2003) (ordering issuance of "Irish"

plate). See, generally, Validity, Construction and Operation of State Statutes Regulating Issuance of Special or Vanity License Plates, 8 A.L.R. 6th 639 (2008). As is evident from the citations, the case law is in some considerable disarray over the question of whether the speech on a vanity plate is public or private.

(2) Legislative preference for one group and viewpoint (*e.g.*, pro-life) over another, competing viewpoint (*e.g.*, pro-choice) in creating affinity (or specialty) plates, compare *ACLU v. Bredesen*, 445 F.3d 370 (6th Cir. 2006) (permitting such discrimination because plate is entirely government speech) with *Planned Parenthood v. Rose*, 361 F.3d 786, rehearing *en banc* denied, 373 F.3d 580 (4th Cir. 2004) (holding such discrimination illicit). *Sons of Confederate Veterans, Inc. ex rel Griffith v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (ordering issuance of affinity plate displaying Confederate flag); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (ordering issuance of pro-life affinity plate).

The problem is particularly acute with regard to affinity plates created by special legislative action. *Bredesen* and *Rose*, two circuit court decisions, illustrate the conflicting positions. In Virginia and Tennessee, a state legislature created an affinity plate for a group opposed to abortion. No affinity plate was created for pro-choice groups. In each case, pro-choice groups sued, insisting that the

preferential status granted pro-life groups violated the Constitution.

Access to the license plate could be had only with the assent of the state legislature, which controlled what appeared on the plate. Even as the plate fulfilled the government regulatory purpose of identifying vehicles, the affinity marker conveyed an exclusively private message about a private organization. The affinity plate was simultaneously a platform for public and private speech.

The Sixth Circuit found, paraphrasing *Johanns*, that the pro-life message was "state speech, 'because the state retains the power to approve every word disseminated at its behest,'" 441 F.3d at 375.

The Fourth Circuit on identical facts categorized the affinity plate as private speech because the state did not design the motto or purport to be offering its own view of the abortion controversy. In doing so, the Fourth Circuit indicated that it was being forced into a procrustean bed of choosing between private or public speech when in fact it confronted (what *Amicus* proposes to call) hybrid speech, 361 F.3d at 793-94.

The Fourth Circuit distilled an unwieldy four-part test from its precedents:

1. the central "purpose" of the program in which the speech in question occurs;
2. the degree of "editorial control" exercised by the government or

private entities over the content of the speech;

3. the identity of the "literal speaker"; and
4. whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

This formless and complex test has now been accepted by the Ninth Circuit, *Arizona Life Coalition*, *supra*, 515 F.3d at 964. But this complex inquiry—which led to opposite results in *Rose* and *Bredesen*—would be simplified if courts were not forced into an either/or selection, but could recognize a joint enterprise for what it was.

C. The Private/Public Speech Doctrine Arose In Public Forum Cases Where No Government Endorsement Was Sought

The emergence of a divide between private and public speech paralleled the emergence of the public forum doctrine. Public forum doctrine governs cases in which would-be speakers seek bare access to publicly controlled property. *E.g.*, *Hague v. C.I.O.*, 307 U.S. 496 (1939) (public streets); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (school mailbox).

The three- or four-part division of publicly-owed property (traditional public, designated public, non-public, and, perhaps, the limited designated public forum) all are relevant when private speakers seek to speak in their own behalf from government owned property. Private speakers do not seek official endorsement of their speech when seeking to speak from a government site. They seek rather the convenience, visibility and accessibility of publicly owned spaces.

That a speaker seeks nothing but access has important legal consequences. Beginning with *Widmar v. Vincent*, 454 U.S. 263 (1981) and continuing through *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), this Court has repeatedly held that purely private speech on public property creates no Establishment Clause difficulties (along the lines of governmental endorsement), because the government adds, and the speaker seeks, nothing of government's own.

The public forum doctrine has over time expanded beyond its original focus on physical access to government property to encompass access to specialized government funding, *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995) (student activity fees) and other intangible government benefits. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985). In these cases, too, the doctrine retains its core feature: private speakers, speaking for themselves only, seek access to government assets as a 'platform' for their speech.

They do not seek to have government amplify their speech by adding its own voice to theirs.

In hybrid cases, however, none of this is wholly true. The private speaker does not merely seek to use a convenient public space for its own speech, but also to co-opt, and speak together with, the public authority. The speaker seeks not only to speak, but simultaneously to enjoy government amplification of its speech. Reciprocally, the government seeks not only to speak on its own behalf, but to join with a distinguished private speaker.

D. The Ten Commandments Monument Remained In Large Part The Eagles' Speech

The record is unfortunately sparse about the details of the Eagles' monument, but it does not appear to differ from the monuments the Eagles erected around the country. What follows is based on the description of Eagles' monuments in *Van Orden*, *supra*, and the earlier decision of the Colorado Supreme Court in *State v. Freedom From Religion Foundation*, 898 P.2d 1013 (1995).

Far from being government speech "from beginning to end," the Pleasant Grove City Ten Commandments monument was designed and prepared by a local chapter of the Fraternal Order of Eagles, following the pattern set by, and as part of, a national campaign conducted by the Eagles for over 50 years.

That campaign promotes the widespread public dissemination of the Commandments in partnership

with government to combat a national evil (juvenile delinquency) identified by the Eagles, and with a cure identified by it. *Van Orden*; *Freedom From Religion*. In *Van Orden* and *Freedom From Religion*, the Ten Commandments monuments bore the symbol of the Eagles. According to the website of the national office of the Eagles, the Ten Commandments display has been reproduced in several hundred thousand paper copies, and, more to the point, on at least 150 "large granite monuments in public places" in 34 states. http://www.foc.com/events/ten-commandments.aspx (visited 8/3/08).

Shortly after their Ten Commandments program was conceived, the actual text of the Ten Commandments (as displayed on the Pleasant Grove City monument and its counterparts around the country) was fixed by an interfaith committee convened by the Eagles to produce a broadly acceptable text of the Commandments, given the wide range of Ten Commandments translations used by different faiths. *Van Orden*, *supra*; *Freedom From Religion*, *supra*, 898 P.2d at 1017.

Pleasant Grove City had no hand in the selection of the text, understandably so, since the promulgation of an "official" biblical translation is beyond government's ken. *Engel v.* Vitale, 370 U.S. 421 (1962).

In accepting ownership and displaying the monument in a park, Pleasant Grove City ratified the Eagles-designed monument whole. Although that adoption made the monument the City's own for many purposes, it did not once and for all cut off the

'parental rights' of the Eagles, or obscure the fact that the speech remained at once and at the same time also that of the Eagles.

Moreover, one of the supposedly viewpoint neutral rules adopted by Pleasant Grove City after Summum demanded a place for its monument to regulate who may be a government speech partner is whether the group has long-standing ties to the Pleasant Grove community.[4] 483 F.3d at 1047. But if the speech on the monument is exclusively the City's, what possible difference could there be in the length of a donor group's presence in the City? The idea is either one the City wishes to propagate or it is not. The length of a donor's association with the City is understandably relevant, though, if the donor's voice continues to be heard in tandem with the City's.

E. The Hybrid Category Will Not Encompass Cases In Which Government Appoints Agents To Speak On Its Behalf

Not every case will fall into the hybrid or joint category. Most will not. They will involve identifiably private or governmental speech. Even where a private group is paid to speak on government's behalf, there will likely not be hybrid speech. *Rust v. Sullivan*, 500 U.S. 173 (1991).

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[4] The other criteria was whether the monument "directly relate[s] to the history of Pleasant Grove," *id.*, a criteria discussed below, p. 37.

Rust is relied on by Petitioners, but it does not negate the existence of a hybrid speech category. That case involved private family planning clinics paid to speak on behalf of government. They do not fall into the intermediate hybrid category. The clinics challenging the "gag rule" about abortion were exclusively agents of the government, paid to convey the government's message. From "beginning to end," *Johanns*, 544 U.S. at 560, the speech of the clinics about birth control (and their silence on abortion) was that of government.

Where a government-funded speaker cannot be thought of as government's agent, the rules are different. Thus, government-funded lawyers are not subject to the same control as family planning clinics. The very nature of their work requires Legal Services lawyers to confront the government, not speak on its behalf. Hence, *Rust* did not sustain a ban on their litigating certain law suits. *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001).

The continuing private voice in regard to the Pleasant Grove City Ten Commandments monument overlapping the City's speech compels a different constitutional analysis than in *Rust*. The relationship between the Eagles and the City is symbiotic in distributing benefits. It ought to be symbiotic in the obligations it imposes.

It is not, on our view of the case, terribly important whether the forum here is a traditional public forum (a park), a designated forum, or even a non-public forum. In each of these circumstances, government, making access available for private

speakers, may not engage in overt, *ad hoc*, viewpoint discrimination of the sort Summum alleges occurred here. That viewpoint discrimination manifests itself at two levels—first, and most enduringly, in the unfettered choice of half-private, half-public monuments the City permits in its parks.

Equally, there is viewpoint discrimination in the City's choice of partners. Popular and established religious groups are fit partners. Unpopular, or fledgling ones, are not. The unguided and standardless choice of partners for joint speech is constitutionally problematic in its own right.

IV. This Court Should Begin The Process Of Establishing Rules For Hybrid Speech

A. The Presence Of Both Government And Private Speech Requires A Unique Set Of Rules

The rules for equal access by private speech to a public forum, on the one hand, and official speech which generates no right to private access for competing views, on the other, are in broad outline reasonably well-settled. Given that this Court has not previously recognized a hybrid category of speech, it has unsurprisingly not yet enunciated special rules to govern it.

It took many cases to work out rules for regulating access to, and speech in, the various categories of public forums. It is not to be expected that in a fully developed set of rules for hybrid speech will emerge in this first case. But a beginning

can be made, drawing on rules governing government interaction with speech generally.

(i) Written rules adopted in advance

Written rules governing hybrid speech must be adopted in advance. These rules must be sufficiently definite to avoid standardless exercises of discretion which can mask blatant viewpoint discrimination in a choice of government's speech partners. As this Court explained in *Forsythe County v. Nationalist Movement*, 505 U.S. 123, 131 (1992), "[i]f the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion' ... by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted ...." (Citations omitted.)

Absent clearly stated written rules that are "narrowly drawn, reasonable and [embody] definite standards," *Forsythe County*, *supra*, 505 U.S. at 133, citing *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951), neither the public nor a reviewing court can be certain that a particular speech partnership was created or rejected pursuant to viewpoint neutral criteria applied evenhandedly. *Cf. Thomas v. Chicago Parks Dist.*, 534 U.S. 316, 324 (2002) ("granting waivers to favored speakers, or more precisely, denying them to unfavored speakers would of course be unconstitutional").

Thus, a rule that monuments must relate to civic, patriotic or historical events and not advance

purely commercial interests would be perfectly acceptable. A rule that simply authorized the executive to join in a partnership acceptable to community sentiment would not be, because it sets out no neutral criteria for deciding what speech is acceptable for joint sponsorship.

Written rules would not prohibit government from departing from any limitations it promulgates. Government remains free to speak exclusively for itself. A rule such as proposed in the previous paragraph might prohibit, for example, a monument to the liberation of South America from Spanish rule erected in a partnership of a municipality and a local ethnic organization, but it would not prohibit a city from erecting such a monument at its own initiative and expense. Nor would the result change if the private group merely suggested a possible monument to city officials, leaving to them its design and financing.[5]

(ii) Time, place and manner rules are acceptable

Content neutral rules limiting the size or shape of monuments, or regulating their placement and length of stay are examples of permissible time,

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[5] This case provides no occasion to consider what category ought to be assigned to monuments or speech initiated and designed by government, but paid for by public subscription, such as Grant's Tomb in New York City, see ww.nps.gov/gegr/historyculture/index.htm, or the Washington Monument in Washington, which was funded by a combination of federal and private funds.

place or manner restrictions. *Rock Against Racism v. Ward*, 481 U.S. 781 (1989). These, too, would be acceptable.

(iii) Content based discrimination is acceptable

As with the designated public forum—with which the joint speech shares in common the fact that entry is not of right or tradition, but dependent on an anterior governmental decision to open up an opportunity for speech, *Perry*, *supra*—rational and broad content based restrictions should be permissible in recognition of government's active speaking role.

However, courts need to be certain that the content based restrictions are not covert surrogates for viewpoint discrimination. Unfortunately, this Court's decisions do not make the distinction between content and viewpoint as clear as it might be (see *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)). Nevertheless, the thrust of the distinction is clear.

Likewise a rule providing that monuments will only be erected to commemorate events more than a certain (reasonable) number of years in the past—similar to rules promulgated by the U.S. Postal Service for issuance of postage stamps[6]—should pass muster, especially since with the passage of time, monuments honoring all events will qualify.

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[6] Reproduced as Appendix A.

(iv) Viewpoint discrimination is impermissible in hybrid speech

Outright viewpoint discrimination—at least if not required by some other constitutional provision such as the Establishment Clause or the Equal Protection Clause—in any context but exclusive official speech is an intolerable First Amendment evil. This is so both as to the message conveyed from a joint platform and the choice of partners. Being seen as allied with government is in itself a significant advantage for a private speaker, and not one that in a hybrid case should be denied on the basis of viewpoint without compelling justification.

This Court has held that even in a non-public forum, where there is no independent right of access, viewpoint discrimination is prohibited. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). If this is so of instances where the speech is disassociated from government, it *a fortiori* ought to be true where private speech is undertaken in active partnership with government.

In its own speech, government is entitled to honor the status quo. It is not free to do so when regulating access to public spaces for private speech, even where the speech has an overlapping government component as well.

The First Amendment values particularly speech challenging the status quo, for that constitutional guarantee was fashioned to assure unfettered interchange of ideas for the bringing about of "political and social changes desired by the people."

Legal Services Corp. v. Velasquez, 531 U.S. 533, 548 (2001), citing *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). Cf. *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (invalidating campaign finance law favoring incumbents). So long as the private voice is heard, the ban on viewpoint discrimination should be enforced with full vigor.

(v) Government may not use size or popularity of a sponsoring group as a surrogate for viewpoint discrimination

A rule that allows partnerships with larger, more established organizations, but not smaller ones, would be constitutionally doubtful. In the Establishment Clause context, this Court has observed that rules favoring larger religious groups pose special constitutional difficulties *Mitchell v. Helms*, 530 U.S. 739, 810 (2000). The same should be true in the speech context. At a minimum, the effect of Pleasant Grove City's policy of jointly sponsoring a Ten Commandments monument, but not one expressing the central dogmas of a small, upstart faith, inevitably has the effect of suggesting a strong preference for the "Judeo-Christian tradition. These concerns carry special constitutional force, *Larson v. Valente*, 456 U.S. 228 (1982).

Taking cognizance of this point, Congress, in codifying rules for access to school spaces for student clubs in the Equal Access Act, 20 U.S.C. § 4071, *et seq.*, prohibited schools from requiring student initiated clubs to have a minimum number of members before invoking the Act, *id.* at § 4071(d)(6).

The obvious purpose of that limit was to prevent invocation of the Act only by popular religious and ideological groups, to the exclusion of the small, counter-cultural, groups most in need of protection from official suppression.

V. THE RULES ADOPTED BY PLEASANT GROVE CITY DO NOT PASS MUSTER

In this case, Pleasant Grove City promulgated formal rules, but only after Summum had first sought to erect its monument. 483 F.3d at 1047. Although the courts below did not make formal findings of fact, neither of the rules it did ultimately promulgate justify acceptance of the Ten Commandments monument and rejection of the proposed Summum monument.

The first of these rules allows Pleasant Grove City to accept monuments for display if the donating group had a long-standing relationship (a term not otherwise defined) with the City. The Fraternal Order of Eagles existed in Pleasant Grove City for only two years before donating its monument. 483 F.3d at 1044. That is not long-standing. Almost all of the other monuments in the park (except a September 11 monument) relate to 19th century events, illustrating what long-standing means. Two years is barely enough to establish that a group has something more than a passing presence. On any fair use of language, it does not qualify as long-standing.

The invocation of a rule which is transparently insufficient is evidence of pretext. Pretext in the

present context, as elsewhere, ought to count as affirmative evidence of an illicit purpose. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) ("'uncouth' 28 sided municipal boundary" proof of racially malignant intent); *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000) (pretextual explanation for adverse employment action positive evidence of disparate treatment).

The second rule permitted monuments which illuminated, or related to, an event or person with a relationship to Pleasant Grove City. 483 F.3d at 1052. Most of the monuments erected by the City easily satisfy this criteria, the two exceptions are a memorial to the singular national tragedy of September 11, and a replica of a 19th century Mormon sacred site in Illinois, which might explain where the City's original settlers came from.

As far as appears in the opinion of the Court of Appeals, and in Pleasant Grove's Brief in this Court, there was no special influence of the Ten Commandments in Pleasant Grove City. Pleasant Grove City in fact claims no such relationship. The rule the City invokes, if it is to serve its intended purpose of limiting the universe of possible monuments, must exclude monuments of universal societal significance. The Ten Commandments monument would satisfy the latter criteria in light of *Van Orden v. Perry*, 545 U.S. 677 (2005), but not the

more restrictive criteria of being a special local interest. This rule, too, appears to be nothing more than a pretext for viewpoint discrimination.

CONCLUSION

For the reasons stated, the judgment must be affirmed.

Respectfully submitted,

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Dated: August 19, 2008

No. 07-665

IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL.,
Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

United States Postal Service
Stamp Subject Selection Criteria

U.S. Postal Service
Stamp Subject Selection Criteria*

1. It is a general policy that U.S. postage stamps and stationery primarily will feature American or American-related subjects.
2. No living person shall be honored by portrayal on U.S. postage.
3. Commemorative stamps or postal stationery items honoring individuals usually will be issued on, or in conjunction with significant anniversaries of their birth, but no postal item will be issued sooner than five years after the individual's death. The Committee will not accept or consider proposals for a subject until at least three years after his/her death. The only exception to the five-year rule is the issuance of stamps honoring deceased U.S. presidents. They may be honored with a memorial stamp on the first birth anniversary following death.
4. Events of historical significance shall be considered for commemoration only on anniversaries in multiples of 50 years.
5. Only events, persons, and themes of widespread national appeal and significance will be considered for commemoration. Events, persons or themes of local or regional significance may be

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* Available at www.usps.com/communications/ organization/csac.htm.

recognized by a philatelic or special postal cancellation, which may be arranged through the local postmaster.

6. Stamps or stationery items shall not be issued to honor fraternal, political, sectarian, or service/charitable organizations. Stamps or stationery shall not be issued to promote or advertise commercial enterprises or products. Commercial products or enterprises might be used to illustrate more general concepts related to American culture.

7. Stamps or stationery items shall not be issued to honor cities, towns, municipalities, counties, primary or secondary schools, hospitals, libraries, or similar institutions. Due to the limitations placed on annual postal programs and the vast number of such locales, organizations and institutions in existence, it would be difficult to single out any one for commemoration.

8. Requests for observance of statehood anniversaries will be considered for commemorative postage stamps only at intervals of 50 years from the date of the state's first entry into the Union. Requests for observance of other state-related or regional anniversaries will be considered only as subjects for postal stationery, and again only at intervals of 50 years from the date of the event.

9. Stamps or stationery items shall not be issued to honor religious institutions or individuals whose

principal achievements are associated with religious undertakings or beliefs.

10. Semipostal stamps are designed to raise funds for causes determined to be in the national public interest and appropriate. Semipostal stamps are sold for a price above their postage value. The differential between the sales price and the postage value of semipostal stamps consists of an amount (less a deduction for the Postal Service's reasonable costs) to be given to other executive agencies in furtherance of specified causes. The Postal Service issues semipostals in accordance with the Stamp Out Breast Cancer Act and the Semipostal Authorization Act.

11. Requests for commemoration of universities and other institutions of higher education shall be considered only for stamped cards and only in connection with the 200th anniversaries of their founding.

12. No stamp shall be considered for issuance if one treating the same subject has been issued in the past 50 years. The only exceptions to this rule are traditional themes such as national symbols and holidays.

AMICUS CURIAE BRIEF

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No. 07-665

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In The
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PLEASANT GROVE CITY,

Petitioner,

v.

SUMMUM,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICI CURIAE OF THE AMERICAN LEGION, VETERANS OF FOREIGN WARS OF THE UNITED STATES, THE MILITARY ORDER OF THE PURPLE HEART, INC., THE NON COMMISSIONED OFFICERS ASSOCIATION OF THE USA, VETERANS OF THE VIETNAM WAR, INC. & THE VETERANS COALITION; AND AMERICAN EX-PRISONERS OF WAR IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The American Legion – The American Legion is a veterans and community service organization representing over 2.6 million members. The American Legion helps veterans survive economic hardship and secure government benefits. It drafted and obtained passage of the first GI Bill and its members were among the primary contributors to the Vietnam Veterans Memorial. It works to promote social stability and well-being for those that have honorably served our nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state and national veterans memorials. The proper resolution of this case is a matter of great concern to The American Legion because the ruling of the Tenth Circuit has a detrimental impact on its ability to honor with veterans memorials those who have and do serve our nation's armed forces.

Veterans of Foreign Wars of the United States ("VFW") – The VFW is a veterans service organizatior representing over 2.3 million members. The VFW was instrumental in establishing the Veterans Administration, creating a GI Bill for the 20th Century and developing the national cemetery

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[1] All parties of record consented to the filing of amicus briefs in support of either or neither party. Amici state that no portion of this brief was authored by counsel for a party and that no person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

system. The VFW also fights for the compensation of Vietnam veterans exposed to Agent Orange and veterans diagnosed with "Gulf War Undiagnosed Illnesses." The VFW helped fund the creation of the Vietnam Veterans Memorial, the Korean War Memorial, the World War II Memorial and the Women in Military Service Memorial. This case is of great concern to the VFW as it threatens the very veterans memorials the VFW helped create and directly threatens the erection of like veterans memorials in the future.

The Military Order of the Purple Heart, Inc. – The Military Order of the Purple Heart is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Purple Heart is a combat decoration awarded only those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is, as well, awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action. Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization composed strictly of combat veterans. As its work, the Order conducts welfare, rehabilitation and service work for hospitalized and needy veterans and their families. The Order is greatly concerned with the outcome of this case as it directly affects the future of veterans memorials that honor those who, like themselves, literally shed their blood in this nation's service.

The Non Commissioned Officers Association of the USA ("NCOA") – The NCOA is a veterans service organization established to enhance and maintain the quality of life for enlisted personnel in all branches of the Armed Forces, National Guard and Reserves. It advocates in the federal legislature on issues that affect enlisted personnel and their families. It provides social improvement programs to help enlisted personnel thrive on active duty, on transition to civilian life and throughout retirement. The NCOA also aids often underpaid enlisted personnel in saving money through merchant program discounts. As the vast majority of veterans are or were enlisted personnel, the NCOA is greatly concerned with the adverse effect a court decision that threatens veterans memorials will have on those it serves.

Veterans of the Vietnam War, Inc., & The Veterans Coalition ("VVnW") – The VVnW is an international veterans organization dedicated to assisting U.S. veterans of all wars and all branches of military service through its programs and services. It strives to maintain, improve, preserve and defend the quality of life of all veterans and their families. VVnW provides transitional housing to homeless veterans as they attempt to reintegrate into society, offers psychological and medical care to needy veterans, and works to educate the public about the debilitating effects of Post Traumatic Stress Disorder and Gulf War Syndrome. VVnW opposes any court ruling that threatens veterans memorials. Such rulings only add to the difficulties and struggles

already burdening so many veterans as a result of their military service.

American Ex-Prisoners of War ("AXPOW") – AXPOW is a national service organization that provides aid to American citizens who were captured by an enemy in time of war. It exists to help those captured in time of war deal with the trauma of their capture and confinement. It is composed of and open to all former prisoners of war from any war involving the United States, including all former civil internees, and their families. AXPOW is greatly concerned with the proper resolution of this case as any ruling adverse to the nation's veterans memorials would dishonor its members who literally have been imprisoned in service to this nation and only add to their trauma.

SUMMARY OF THE ARGUMENT

The ruling by the Tenth Circuit poses a danger to the free speech jurisprudence of this Court and is a direct threat to veterans memorials nationwide. The Court should not force upon governments an on-demand stewardship policy for the permanent erection of privately donated, unattended monuments on public grounds.

Failure to reverse would be devastating to our nation's veterans memorials. Any city with a memorial honoring our veterans would now also have to allow a memorial dishonoring them. Cities would face

the chilling ultimatum of refusing to erect any future donated veterans memorial and removing any currently in place to avoid disgrace or "brac[ing] themselves for an influx of clutter" or worse. *Summum v. Pleasant Grove City*, 499 F.3d 1044, 1175 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc). This precise result is, in fact, already occurring. *See, e.g.*, Choate, Trish, *Memorial Delay Disappoints Veterans Group*, ABILENE REPORTER NEWS (May 1, 2008), http://www.reporternews.com/news/2008/may/01/memorial-delay-disappoints-veterans-group/ (U.S. Army fails to erect a monument to fallen WWII veterans due to concern caused by Summum case).

The Court should reverse the judgment of the Tenth Circuit and restore the ability of cities to erect and keep privately donated veterans memorials without being forced to accept other monuments. There are two ways the Court may do so and maintain the integrity of its speech jurisprudence. The permanent erection of privately donated, unattended monuments on public grounds is an obvious exercise of government speech. This finding requires clear limitations and guidelines to prevent future government abuse of private speech but is a solid basis for disposition. Alternatively, the best possible resolution of this case is for the Court simply to hold that there is no forum for the permanent erection of a donated, unattended monument on government property – it is "not a forum at all." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). This would dispose of the questions presented in this case with

no additional analysis required, adhere to and preserve established speech jurisprudence of the Court and protect the nation's veterans memorials from harm.

ARGUMENT

I. The nation's veterans memorials deserve protection.

The ruling of the Tenth Circuit is devastating to veterans memorials. These memorials, erected to honor our veterans and the wars and battles in which they fought, account for a massive number of donated memorials erected in the public square in almost every community nationwide. Under this precedent, should the Court fail to reverse it, any governmental entity, from the smallest municipality to the United States itself, is presented an impossible choice: tear down its memorials donated to honor its veterans, requiring that none be erected in the future, or retain its memorials donated to honor its veterans and, upon donation, accept and erect on the same grounds monuments that dishonor them.

Our veterans memorials have become ingrained in our national identity as deeply as any part of our culture could. When one thinks of Iwo Jima, among the first images that come to mind is that of five Marines and a Navy corpsman, battle weary and ragged, struggling to hoist the Colors atop a craggy, body strewn Mt. Suribachi, an image captured in bronze and black granite in a park in Arlington,

Virginia. Thoughts of Vietnam unwaveringly turn to a long, spare granite wall standing on the National Mall in Washington, D.C., a stark and unyielding roster of those who died in that war. In numerous towns and cities across our nation, World War I is forever tied to their own Spirit of the American Doughboy – life-size sculptures of a lone uniformed soldier of the Great War with arm raised, determinedly striding forward. For many black Americans, reflections on the Civil War bring to mind the African American Civil War Memorial, the only national memorial to the black veterans of the war in which the freedom of an entire people was won.

While varied in form and effect, and erected in commemoration of different people from different eras, these memorials share two things in common: they stand in public parks in honor and remembrance of veterans from their respective wars, and they were donated by private parties for permanent display in the public square.[2]

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[2] The United States Marine Corps Memorial (i.e., the Iwo Jima monument), located in a public park in Arlington, Va., was donated by individual Marines and friends of the Marine Corp. *See* The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: VA000244; then click "The United States Marine Corps War Memorial"). The Vietnam Veterans Memorial (i.e., The Wall), erected on the National Mall in Washington, D.C., was donated by contributions from more than 275,000 individuals. *See* The Vietnam Veterans Memorial, http://thewall-usa.com/information.asp. A great number of Doughboys erected in public

(Continued on following page)

Accordingly, the Tenth Circuit's analysis requires that upon donation and alongside the Iwo Jima memorial, a monument to the benevolence of the prison guards of the Bataan Death March be erected, as well as one applauding the contributions of the kamikaze. Upon donation, per the Tenth Circuit, it would be constitutionally required to accept and erect a large bust of Ho Chi Minh, renowned purveyor of democratic principles and human rights, on the National Mall along with the Vietnam Veterans Memorial. Upon donation, the towns across the country with World War I Doughboys must also erect a monument donated to honor the leaders of the Central Powers. And the Tenth Circuit would find that erection of the donated African American Civil War Memorial would, upon request, require upon the same grounds erection of a donated alabaster sculpture of a hooded man in white robes bearing the title of grand dragon.

The destruction and chilling of our veterans memorials is not a viable option, nor is it the law.

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parks across the country were donated to their respective towns by private organizations and civic groups. *See* http://members.tripod.com/doughboy_lamp/earlspages/id63.html (click on Anniston, AL, Birmingham, AL, Ft. Smith, AR, etc.). And the African American Civil War Memorial, erected in a public plaza in the heart of Washington, D.C.'s Shaw neighborhood, was donated through private contributions to the Freedom Foundation of the same name. *See* The African American Civil War Memorial Freedom Foundation, www.afroamcivilwar.org (then click "The Memorial" and "Historic U Street"); Telephone interview with representative of The African American Civil War Memorial Freedom Foundation, Washington, D.C., November 10, 2007.

What effect would the court sanctioned destruction of veterans memorials do to the soldier who even now is patrolling the streets of Baghdad with death crouched at every street corner and behind every door? What would it mean to the legless Marine in Walter Reed struggling to make sense of his injuries and put his life back together? What would it mean to the homeless veteran on the streets of Chicago? What effect would it have on the remaining veterans who survived Pearl Harbor and suffer nightmares even now?

Our veterans memorials serve as unchanging reminders of who we are as a nation and where we have been. How else should this be done? In forgotten books gathering dust on the hidden shelves of libraries? In motion pictures once watched and put out of mind? Public memorials are among the most powerful tools of remembrance available to the modern world. Each time we see them, our veterans memorials force us to remember, if only fleetingly and only for an instant, that there were those who held the line, that there were those who answered the call, that there were those who rose to the task at peril of their lives to give themselves to something they deemed worthy of their life. They force us to remember that the security and prosperity of this nation did not come without a price, both high and dear, and that its birth and continued survival has been hard fought and hard won.

Our veterans memorials force us to remember. If we fail to remember, we will forget. And if we forget the men and the women and the struggles and the

virtues our veterans memorials commemorate, we will suffer for it. And what effect will it have in the future when we call on our own to don the uniform once more and go in harm's way? Following each conflict, following each time we called upon our own to serve and often to die, there arose afterward an instinctive need to commemorate that service in a very public and permanent manner. The result unwaveringly has been a lasting memorial of wood or stone or metal erected to honor and remember those who served and those who died. Without appropriate action by this Court, the destruction of tens of thousands of these memorials in every community and every state nationwide will be unleashed.

Amici, therefore, representing millions of veterans nationwide, request this Court secure and protect the future of our nation's veterans memorials by reversing the Tenth Circuit.

II. Monuments owned, controlled and displayed by the government are government speech.

The permanent erection of unattended, donated monuments on government grounds without question is government speech. The precedent of the Court makes this unambiguously clear. *See generally Rust v. Sullivan*, 500 U.S. 173 (1991); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819. Predictably, so do the Courts of Appeals. *See PETA v. Gittens*,

414 F.3d 23, 28-29 (D.C. Cir. 2005); *ACLU v. Schundler*, 104 F.3d 1435, 1444 (3d Cir. 1997), *cert. denied*, 520 U.S. 1265 (1997); *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988). *See also ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 774, 778 (8th Cir. 2005); *Freedom From Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000).

It is simply not credible, either by precedent or logic, to arrive at a contrary conclusion. When a private group donates a monument to a government, voluntarily surrendering all ownership and control over it, the group retains no interest or right in the monument, be it location, care, message, alteration, future ownership or destruction. All "private" aspects of the monument are gone, severed by operation of donative transfer. This necessarily includes any claim of private speech, as all features of the monument, including display of its message, now belong to a government. And a government, by definition, cannot engage in private speech. The monument sheds all relevant relation to the private sector upon donation to a government.

This becomes even clearer in the present context. Pleasant Grove (the "City"), like many cities, has a theme for its park, an overriding message it wants to convey, and the displays and monuments in the park are erected as part of that larger theme. Pioneer Park, the very name of which heralds its theme, is a memorial to the historical influences on and heritage of the City. Displayed within its bounds is the City's

first city hall and first fire department building. It also contains one of the City's first granaries, and a Ten Commandments monument donated by a civic group with forty year ties to the City.[3] This is not a situation where a government has erected blank monuments for private speakers to fashion their own message. *See Tong v. Chicago Park Dist.*, 316 F. Supp. 2d 645 (N.D. Ill. 2004). The government has its own theme and message. Inscriptions are often offered to display the history of that item alone, but the monuments and artifacts taken as a whole reflect a government theme, as is the case with the park in Pleasant Grove. This is simply a local government selecting for display in its park monuments consistent with the park's theme and purpose. In other words, this is government speech.

The recognition that the "speech" at issue in this case is government speech is dispositive of the questions presented. The government "may make content-based choices" in what it says and refrains from saying, "regulat[ing] the content of what is or is not expressed." *Rosenberger*, 515 U.S. at 833. Viewpoint

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[3] This particular monument was donated by the Fraternal Order of Eagles, who expressly assert "each time we have donated a [Ten Commandments] plaque or monument we have surrendered any ownership or control we may have had in it." Letter from Fraternal Order of Eagles to Liberty Legal Institute, June 19, 2008, attached as an appendix to this brief. The Eagles go on to explain that "the donee retained complete ownership and control of the plaque or monument upon acceptance and delivery. We have no legal claim to any of them." *Id.*

discrimination is not an issue in government speech as the government may engage in viewpoint discrimination "in instances in which the government itself is the speaker." *Velazquez*, 531 U.S. at 541. Thus, forum analysis would be inapplicable, as well. When the government speaks it is free to choose its message, its mode of delivery, and whether its message will be conveyed by a public or private speaker. *See Rust*, 500 U.S. at 194; *Rosenberger*, 515 U.S. at 833; *Velazquez*, 531 U.S. at 541-42.

Government certainly is not required to convey a message it does not wish to convey, nor should it. That is why we have elections. "[W]hen the government speaks, for instance to promote its own policies or advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Velazquez*, 531 U.S. 533, 541-42 (quoting *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000)) (internal quotation marks omitted). Government speech is regulated not by the judiciary but by the political process, and properly so.

This Court should be careful, however, in describing the boundaries and limitations of government speech in the context of the present case, or private speech rights could be severely curtailed. Absent clear limitations and guidelines, this case could be misused to permit government co-opting of private speech as government speech in order to rob truly private speech of its protection. For example, a city could

open its community center to allow a group to give free seminars on global warming. If another group wanted to give free seminars on the same topics in the same community center, but advocate that global warming is a hoax, a government hostile to those views could simply adopt the seminars of the first group as its own, making them government speech and so closing an otherwise public forum to all disfavored speech. Government must not be allowed to forcibly take over and own truly private speech as a means of stripping it and other private speech of constitutional protection.

Specific limitations and guidelines, however, would do much to neutralize these dangers and ensure the continued vitality of private speech protections. In the present case, narrow construction is a prudent first step, expressly limiting relevant analysis to the specific facts of this case: the permanent erection of privately donated, unattended monuments on public grounds. Likewise, appropriate guidelines for a government to adopt such a monument as its own are the voluntary surrender by the private donor of all ownership and control over the monument accompanied by the government's express retention of ownership and control, to include the burden of all maintenance and repair. The government must not merely own the property upon which private expression occurs, such as the land where a private speaker walks wearing a sandwich board, but must own the actual objects and expressions themselves. The government must own and control all facets of the

monument, the very expression itself, before it becomes government speech.

Narrowly limiting any analysis to the specific context of this case provides an unyielding bulkhead to any future attempt to subvert free speech protections. Requiring the private surrender and government retention of ownership and control provides the critical bases for such a narrow construction, bringing this case in line with the precedent of the Court and providing guidance to the lower courts for future analogous cases. With such limitations and guidelines, the global warming example given earlier of government abuse of the government speech doctrine would not be an issue. The example, obviously, did not involve erecting permanent monuments nor did the private speakers surrender ownership or control of their expression to the government. The decisions concerning what would be expressed were made by the speakers, not the government in a land and monuments committee. These boundaries would ensure the continued vitality both of government speech and private speech and ensure that implementation of the solution is not as damaging as the problem itself.

The government's permanent erection of donated, unattended monuments and displays on public grounds is government speech. This disposes of the case. With the proper limitations and guidelines, this would be a consistent addition to the Court's jurisprudence protecting speech while avoiding future abuses.

III. There is no forum for the erection of permanent monuments on public grounds.

An even clearer and simpler resolution of this case is that there is no forum for the permanent erection of privately donated, unattended monuments on public grounds. Use of forum analysis in this case is unnecessary and inconsistent with the Court's speech jurisprudence. The imposition here of forum analysis could do tremendous damage to speech rights, extending the bounds of forum analysis beyond its intended sphere. *See United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003) ("The public forum principles . . . are out of place in the context of this case.").[4] Forum analysis should not be used in this case because *there is no forum* for the erection of donated permanent monuments on public grounds – it is "not a forum at all." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). This

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[4] As is made clear in the analysis that follows, though no forum analysis is appropriate, the only possible forum designation in this case is nonpublic forum. Public forum analysis, in general, and nonpublic forums, in particular, are subject to heavy manipulation, allowing a crafty government entity to discriminate with respect to viewpoint under the guise of speaker identity and subjective reasonableness. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). Considering this ease of manipulation, forum analysis in any context should be subjected to the limitations alluded to by the Court in *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 573-74 (1987) (citing Laycock, Douglas, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 48 (1986)).

Court's "cases dealing with speech forums are simply inapplicable." *Locke v. Davey*, 540 U.S. 712, 721 n.3 (2004) (citing *Am. Library Ass'n*, 539 U.S. at 205; *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 805 (1985)).

A. There is no history or tradition of private citizens erecting unattended monuments in public parks without government consent.

The existence of a forum is not determined "merely by identifying the government property at issue," but by the particular access to the government property that is sought. *Cornelius*, 473 U.S. at 801. Erection of unattended monuments on government property has certainly not "immemorially been held in trust for the use of the public." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992). "[P]ermanent displays do not fall within the set of uses for which parks have traditionally been held open to the public," and "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments." *Summum*, 499 F.3d at 1173 (Lucero, J., dissenting from denial of rehearing en banc). *See also Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) ("Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved."); *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993) ("There is no

private constitutional right to erect a structure on public property."); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) ("We are not cognizant of . . . any private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures."); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989) (finding permanent physical occupation of park space does not fall within the scope of the traditional public forum).

A contrary view would extend the "doctrines surrounding traditional public forums . . . to situations where such history is lacking," an endeavor consistently rejected by this Court. *Am. Library Ass'n*, 539 U.S. at 206. A contrary view would, as well, transform every public sidewalk, park and street in the nation into fora for the erection of unattended monuments. If, as the Tenth Circuit held, all parks are now traditional fora for the private construction of monuments, it is irrelevant whether there is currently a monument on the property in question. If the property is a traditional public forum and erection of monuments is private speech, then barring obstruction of the property any individual can haul any given monument to his sidewalk, park or street of choice and leave it as a permanent testimony to his constitutionally protected right of private expression. The proverbial floodgates are open. If the Tenth Circuit is not reversed, every traditional forum for speech in the nation must "brace [itself] for an influx of clutter"

or worse. *Summum*, 499 F.3d at 1175 (McConnell, J., dissenting from denial of rehearing en banc).[5]

Even designation as a non-public forum is inappropriate here. As with any forum analysis, it must pre-suppose that the permanent erection of a donated, unattended structure on public grounds involves an act of private expression, and one, no less, protected by the First Amendment, two assertions for which there is no credible precedent or logic. *See Cornelius*, 473 U.S. at 800 (quoting *Perry*, 460 U.S. at 46) (describing non-public forum analysis as whether restrictions on private expression are reasonable and without intent to suppress a particular viewpoint). Such an erection no more involves private expression than the erection of a donated public swimming pool or erection of a donated annex to city hall. The City has not "silence[d] speakers by expressly threatening censorship of ideas." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998) (internal quotations omitted). Nor has it "introduce[d] considerations that, in practice, would effectively preclude or punish the expression of particular views." *Finley*, 524 U.S. at 583. All are free to speak at the park (leafleting, carrying signs, oral utterances, etc.) and free to have temporary displays, subject to reasonable time, place

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[5] Similarly, the record includes no evidence of government intent or affirmative choice to create a forum for the erection of permanent monuments. *See Am. Library Ass'n*, 539 U.S. at 206; *Cornelius*, 473 U.S. at 802-03; *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45-46 (1983).

and manner restrictions. However, no one has ever had a right to construct unattended permanent memorials on public property. While the park is a forum for *speech*, it is not a forum for the permanent display of donated monuments.

B. The permanent erection of privately donated, unattended monuments on public grounds is not a forum for speech.

This Court has never held that any and every activity involving public property is some species of forum. To the contrary, the Court has on at least three occasions expressly stated precisely the opposite. *See Forbes*, 523 U.S. at 677, 678 (finding that some government property is "not a forum at all"); *Locke*, 540 U.S. at 721 n.3 (finding a public scholarship program is "not a forum for speech"); *Am. Library Ass'n*, 539 U.S. at 205 (finding that "forum analysis" is "incompatible" with some government activities). In keeping with this precedent, permanent erection of donated, unattended monuments in a public park "is not a forum for speech." *Locke*, 540 U.S. at 721 n.3. The displays in the park are there to preserve and display the City's history and heritage, "not to encourage a diversity of views from private speakers." *Locke*, 540 U.S. at 721 n.3 (quoting *Am. Library Ass'n*, 539 U.S. at 206 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995))) (internal quotation marks omitted). It is nothing more than the government performing its "traditional role in identifying suitable and worthwhile"

structures for permanent erection and display in its public parks, structures "that would be of the greatest direct benefit or interest to the community." *Am. Library Ass'n*, 539 U.S. at 204, 208. The City has merely "prevent[ed] the [park] from becoming a battlefield" for permanent displays (an inescapable result of the Court of Appeals' analysis), which would "disrupt the property's intended function." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 52 n.12.[6]

This Court has recognized that a library does not collect books to display on its shelves "to provide a public forum for the authors of the books to speak." *Am. Library Ass'n*, 539 U.S. at 206. In the same way, government decisions on what monuments to erect in a public park no more create a forum for private expression than the erection of any other donated structure in that same park, be it a donated recreation center, pavilion, sidewalk, library, playground or swimming pool. Like the curator of the Smithsonian American Art Museum, who must accept or reject any number of donated pieces for display, a government has the traditional role and authority to accept or

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[6] Some might assert that implementation of the selective access doctrine should apply. This would be an improper disposition of this case. As there is no forum for the permanent erection of donated, unattended monuments on public grounds, selective access is not at issue. There is no forum to which access could be selectively granted. Use of the doctrine in this case would be improper and inconsistent with this Court's speech jurisprudence.

reject any and all donated materials for permanent display in its public parks.

The implications of a contrary finding are unacceptable. For example, Battery Park on Manhattan Island, New York, is the current home of The Sphere and eternal flame, memorials to the fallen of September 11, 2001. As a public park it is also a traditional public forum. According to the Tenth Circuit, the people of New York should be required to accept and erect, upon the same ground, a monument donated to extol the virtues of al-Qaida and the vision of its leaders. Likewise the U.S. Soldiers Monument in Shelby, Michigan,[7] the Maryland Soldiers Monument in Baltimore, Maryland,[8] the tens of thousands of veterans memorials donated and erected in the public square of countless towns by The American Legion, Veterans of Foreign Wars, Military Order of The Purple Heart, etc., all are privately donated memorials erected on public grounds that are traditional forums for speech. According to the Tenth Circuit, each of the areas housing these memorials are now public fora in which any donated monument espousing protected speech can and must be displayed regardless of viewpoint. Since most every veterans memorial in the nation is both privately donated and

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[7] *See* The Smithsonian Institution Research Information System, http://siris-collections.si.edu/search (enter the following into "Search" box: MI000301; then click "US Soldiers Monument").

[8] *See* The Descendants of Mexican War Veterans, www.dmwv.org/honoring/baltimore.htm.

erected on public grounds that are traditional public forums for speech, failure to reverse the Tenth Circuit would open the floodgates nationwide for attacks on veterans memorials both by clutter and derogation. Such a result is not required by the First Amendment and is unacceptable.

The best possible resolution of this case is for the Court simply to hold that no forum exists for the permanent erection of a donated, unattended monument on government property – it is "not a forum at all." *Forbes*, 523 U.S. at 678. This finding is simple, narrow, faithful to the precedent of the Court, and prevents an absurd context from polluting the Court's speech jurisprudence. This finding alone, apart from any additional analysis, disposes of the questions presented in this case: if there is no forum, there is no right to private speech. Any further analysis is unnecessary and needlessly risks limiting truly important speech rights. Such a finding would allow the Court to reverse an erroneous decision in the Tenth Circuit, protect veterans memorials nationwide and preserve the integrity of forum analysis and free speech jurisprudence while adhering to established precedent of the Court. It is, again, the best possible resolution of this case.

In the tragically prophetic words of Judge McConnell, "[e]very park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter." *Summum*, 499

F.3d at 1175 (McConnell, J., dissenting from denial of rehearing en banc). Amici quite literally *are* the VFW, and the American Legion, and the American Ex-Prisoners of War, and multiple other veterans organizations whose very members these memorials were erected to commemorate and honor. The fate of our veterans memorials is in the hands of this Court.

The Court must preserve our veterans memorials, which stand the most to lose in the wake of the Tenth Circuit's ruling. Millions of veterans, represented by amici, implore it to do so. This Court may, without question, choose another course. It has the power to allow the Tenth Circuit's ruling to stand and thus the veterans memorials to fall. But if it does, if after repeated warnings[9] and in the face of certain destruction this Court fails to render our veterans memorials the protection they deserve, this nation will walk that course with heads bowed, not in reverence, but in disgrace, ingratitude and shame.

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[9] The American Legion filed an amicus brief in *McCreary County v. ACLU*, 545 U.S. 844 (2005), warning this Court that veterans memorials across the country would perish if guidance was not issued to protect them. *See also Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (*en banc*) (enjoining as unconstitutional a veterans memorial in San Diego, Ca.); *Buono v. Kempthorne*, 364 F. Supp. 2d 1175 (C.D. Cal. Apr. 8, 2005) (affirmed by *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007)) (enjoining as unconstitutional a veterans memorial in the Mojave National Preserve).

CONCLUSION

The Tenth Circuit's ruling in this case is inconsistent with and damaging to this Court's speech jurisprudence. It is, as well, devastating to the nation's veterans memorials. The Court should reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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PLEASANT GROVE CITY, UTAH, *ET AL.*,

Petitioners,

v.

SUMMUM

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND ROBERT AND MILDRED TONG IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI*

Amici Robert and Mildred Tong are the prevailing plaintiffs in *Tong* v. *Chicago Park Dist.*, 316 F. Supp. 2d 645, 651 (N.D. Ill., 2004), which held that the Chicago Park District's refusal to place a brick, duly purchased by *amici* and bearing a religious message, in a walkway composed of other bricks purchased by

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* Undersigned counsel authored this brief in whole. No person has made a monetary contribution intended to fund the preparation or submission of this brief.

other private parties and bearing a wide assortment of messages, was viewpoint discrimination under the Free Speech Clause of the First Amendment. *Amici* are concerned that the Park District may misunderstand the Court's ruling in this case and think it has the right to selectively censor their brick.

Amicus The Becket Fund for Religious Liberty is a nonpartisan, interfaith public interest law firm dedicated to protecting the free expression of all religious traditions. We represented the Tongs in their lawsuit and regularly represent other individuals and organizations whose rights will be affected by this case in lawsuits across the country.

SUMMARY OF ARGUMENT

This brief makes just one point: that just as a short-term unattended display may be either government speech or private speech, so too a long-term, virtually permanent inscription on public property may be either government speech or private speech. The monument in the present case is surely government speech. The city, after all, is free to do with it as it pleases; it can alter the inscription, move the monument, or take it down altogether, at any time for any reason. It is important to distinguish this type of long-term government speech from the sorts of long-term private speech that occur in religious messages or symbols placed, for example, on headstones in government cemeteries or on bricks or tiles commonly sold by, and placed in walls or walkways of, public schools and libraries for fundraising purposes. These latter sorts of inscriptions are intended to remain in place

indefinitely, if not permanently. Nevertheless, they remain private speech and the government should not be permitted to selectively censor them no matter how long they remain in its power and physical control.

ARGUMENT

Amici file this brief to bring to the Court's attention one straightforward but important point: That while the monument at issue here is indeed government speech, not all long-term expression on public property necessarily is.

Just as an unattended crèche, menorah or cross erected for a limited time may be either government speech, *see, e.g.*, *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), or private speech, *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753 (plurality op.) (1995), so too more permanent sorts of expression erected on public property may be either government or private speech. The monument at issue in this case is a good example of such government speech. Other examples include the various sorts of displays in government museums that the government acquires through purchase or donation.

By contrast, a good example of long-term *private* speech on public property is the religious symbolism on headstones in government cemeteries. The National Cemetery Administration, which is part of the Department of Veterans' Affairs, runs some 119 national cemeteries. *See generally Griffin* v. *Sec'y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed. Circuit

2002). Additionally there are a great many state and municipal cemeteries around the country. *See generally Warner* v. *City of Boca Raton*, 64 F. Supp. 2d 1272, 1290-91 (S.D. Fla. 1999). Though government property, and open to the public, these cemeteries nevertheless provide a forum for the permanent display of private, religious and other speech engraved by family members on the headstones of their deceased.

Other instances of long-term private speech are the commemorative bricks and tiles commonly sold by, and cemented into the walkways and walls of, public schools, libraries, and other institutions as part of their fundraising efforts. See, *e.g.*, *Tong* v. *Chicago Park Dist.* 316 F. Supp. 2d 645 (N.D., Ill., 2004. [1] In that case, *amici* Robert and Mildred Tong participated in a "buy-a-brick" fundraising program operated by the Chicago Park District, which invited participants to "Choose Your Words" and to "Leave Your Mark on Senn Park." 316 F. Supp. 2d at 651.

Many purchasers left a wide variety of "marks" on the park. Bricks purchased under the program featured messages ranging from commercial advertisements to opinions on the purchasers' pets, *e.g.*, "Bootsie Albert Drennan Best Cat Ever!" 316 F. Supp. 2d at 651. The Park District received and installed them all. But when the Tongs purchased a brick that read "Dear Missy, EB & Baby Tong, Jesus is the Cornerstone. Love Mom & Dad," *Id.*, the Park

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[1] *See also Kiesinger* v. *Mexico Academy and Cent. Sch.* 427 F. Supp. 2d 182 (N.D.N.Y, 2006); *Demmon* v. *Loudoun County Pub. Sch.* 324 F. Supp. 2d 474 (E.D.Va., 2004).

District rejected it because it included the name Jesus. The federal district court for the Northern District of Illinois ordered the brick installed in Senn Park, ruling that the Park District's rejection of it amounted to viewpoint discrimination, and noting drily that had *amici's* brick read "Bootsie is the Cornerstone," the Park District would surely have accepted it. 316 F. Supp. 2d at 657.

That ruling is plainly correct. The messages inscribed on the bricks in the Chicago Park District's walkway and those engraved on the headstones in government cemeteries, while on public property and more or less permanent, are nevertheless still private speech.

Emphasizing this distinction between the type of long-term government speech at issue here and long-term private speech is necessary to maintain the ongoing integrity of fora across the country. There is no question that the city in this case is perfectly free, at any time, for any reason, to move the monument, to alter its engraving, or to take it down altogether. See *Summum* v. *Pleasant Grove City*, 499 F.3d 1170, 1176 (McConnell, J., dissenting from denial of rehearing en banc)(10th Circuit 2008). But the government should most certainly *not* be free to change the religious symbol on a cemetery headstone, from say, a Star of David to a Cross. Similarly, a government agency, having solicited message-engraved bricks for its school or library, should not be permitted to sandblast off individual messages that it (or a subsequent administration) may not like. Governments may well be free, at least as a matter of the Free Speech Clause, to close such

fora entirely by tearing up the walkways, breaking down the walls, or even removing all the headstones. What they should not be able to do, however, is to selectively censor the individual messages that those items record. The reason, quite simply, is that the messages on headstones and commemorative bricks remain private speech, and not government's speech, no matter how long the items themselves remain in the government's possession and physical control. Governments may not do with the messages on their headstones and commemorative walkways and walls what the city here is perfectly free to do with its monument—anything, at any time, for any reason.

In sum, *amici* respectfully submit that in deciding this case, this Court should explicitly distinguish long-term government expression on government property from long-term private expression on such property, and emphasize that private speech, whether short-term or long-term, still enjoys the full protection of the Free Speech Clause of the First Amendment.

CONCLUSION

For the foregoing reasons, the ruling of the United States Court of Appeals for the Tenth Circuit should be reversed in such a way that the baby is not thrown out with the bathwater.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, *et al.*,

Petitioners,

v.

SUMMUM,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* BOY SCOUTS OF AMERICA IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE* *

Boy Scouts of America ("Boy Scouts") is "a private, not-for-profit organization engaged in instilling its system of values in young people." *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000). Three million youth members and one million adult leaders are active in the traditional programs of Cub Scouting, Boy Scouting, and Venturing.

All Boy Scouts and their adult leaders agree to follow the Scout Oath and Law,[1] which embody traditional values. *See Dale*, 530 U.S. at 649. The Scout Oath includes the obligations to do one's "duty to God" and to be "morally straight." *Id.* In adhering to these values, Boy Scouts does not accept as members atheists or agnostics, *see Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1268 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); *Randall v. Orange County Council, Boy Scouts of America*, 952 P.2d 261, 264-65 (Cal. 1998), or avowed

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* The parties have consented to the filing of this brief, and their consent forms have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

1. The Scout Oath states that "On my honor I will do my best / To do my duty to God and my country / and to obey the Scout Law; / To help other people at all times; / To keep myself physically strong, / mentally awake, and morally straight." *Dale*, 530 U.S. at 649. The Scout Law provides that a Scout is "Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent." *Id.*

homosexuals, *see Dale*, 530 U.S. at 653-54; *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 224-25 (Cal. 1998).

Since this Court confirmed Boy Scouts' First Amendment rights eight years ago, Boy Scouts has been defending itself against attacks by persons who seek to exclude Boy Scouts from participation in government programs and attacks from government entities themselves. *E.g.*, *Barnes-Wallace v. Boy Scouts of America*, ___ F.3d ___, Nos. 04-55732 & 04-56167, 2008 WL 2415079, 2008 U.S. App. LEXIS 12422 (9th Cir. June 11, 2008); *Cradle of Liberty Council, Boy Scouts of America v. Philadelphia*, No. 08-CV-02429-RB (E.D. Pa. filed May 23, 2008); *Winkler v. Gates*, 481 F.3d 977 (7th Cir. 2007); *Evans v. Berkeley*, 129 P.3d 394 (Cal.), *cert. denied*, 127 S. Ct. 434 (2006); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001). *See generally* Erez Reuveni, Note, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. Rev. 109, 114-20 (2006).

In most of these cases, Boy Scouts participates in a government forum or program with many other community organizations. In *Barnes-Wallace*, the City of San Diego leases 123 properties to nonprofits for nominal rent, and Boy Scouts leases two of these properties for a campground and an aquatic center open to all youth. In *Cradle of Liberty*, the City of Philadelphia leases approximately 100 properties to community organizations, including 14 youth organizations, and Boy

Scouts holds one lease for a Scout and Learning for Life[2] headquarters. In *Evans*, the Sea Scouts were one of several nonprofit organizations that had received free berth space in the City of Berkeley's marina. In *Wyman*, Boy Scouts was one of 900 organizations listed in the state employee charitable campaign. In *Till*, Boy Scouts was one of dozens of community organizations that used meeting space in the public schools. In all of these cases, Boy Scouts was singled out for different treatment from other organizations because of its views.

These cases represent the increasing challenge faced by Boy Scouts and other groups with traditional moral or religious values because of their interactions with government. *Dale* may have protected Boy Scouts from challenges to membership, but activists and governments themselves have launched attacks to exclude Boy Scouts from government facilities and programs open to a variety of other groups because of Scouting values.

In response to challenges to Boy Scouts' participation in government forums,[3] Congress enacted the Support Our Scouts Act of 2005. Pub. L. No. 109-

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2. Learning for Life is a non-membership character-building organization affiliated with Boy Scouts of America that is open to all who wish to participate.

3. *See* 151 Cong. Rec. S8603 (daily ed. July 21, 2005) (In response to Boy Scouts' "relationships with government at all levels" being targeted, the Act, "makes clear that the Congress regards the Boy Scouts to be a youth organization that should be treated the same as other national youth organizations.") (statement of Sen. Frist); *see also* 151 Cong. Rec. S2853 (daily ed. Mar. 16, 2005) (statement of Sen. Frist).

148, § 8126, 119 Stat. 2728, 2730 (2005). Among other objectives, the Act prohibits state or local governments that receive federal Community Development Block Grant ("CDBG") funds from discriminating against Boy Scouts in government forums or denying Boy Scouts access to forums equal to that provided other groups. *See* 42 U.S.C. § 5309(e)(2) (2008). The Act was modeled after the Boy Scouts of America Equal Access Act, which was intended to address the similar problem of schools denying Boy Scouts access to facilities and meeting space. *See* 20 U.S.C. § 7905 (2008). Although this legislation has helped deter some from excluding Boy Scouts, legislation has by no means extinguished the attacks.

The First Amendment prohibition on viewpoint discrimination in any government forum — whether public, limited, or nonpublic — protects Boy Scouts and numerous other organizations from being singled out and excluded from the public domain. Any resolution of this dispute that extends beyond the donated, government-owned permanent monument at issue here and any attempt to limit the forum analysis could have profoundly detrimental effects on many organizations that are protected by this Court's government forum jurisprudence.

ARGUMENT

THIS CASE SHOULD BE RESOLVED WITHOUT COMPROMISING FIRST AMENDMENT PROTECTIONS IN GOVERNMENT FORUMS

The resolution of this case should not encroach on the jurisprudence that protects numerous organizations in government forums. This case presents a question limited to a city's decision to display certain donated monuments as passive, permanent fixtures in public parks. The question whether the government, rather than any private party, speaks when government displays permanent monuments that it owns need not affect this Court's well-established precedents prohibiting the government from discriminating against private organizations in government forums for private speech. Boy Scouts participates in many such forums and would be harmed by a decision extending beyond the unique facts here.

A. This Case Presents A Question Limited To The Display Of Government-Owned Monuments In Public Parks

The parties agree that this case is limited to a permanent monument that has been donated to a municipality intended by the donor for display in a public park. Petitioners refer to a "monument donated by a private party" to a municipality for "permanent display." (Pet. at 1.) Respondents describe the display as a "privately-donated" "permanent" structure. (Resp. at 1.) The Tenth Circuit likewise focuses on the donated permanent monument at the heart of this

dispute. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1047 (10th Cir. 2007). As a result, the decision should be limited to permanent, government-owned monuments.

Boy Scouts recognizes that "[t]he Government, 'no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.'" *United States v. Grace*, 461 U.S. 171, 178 (1983) (quoting *Adderly v. Florida*, 385 U.S. 39, 47 (1966)). This Court has "regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *Id.* at 177-78 (quoting *Adderly*, 385 U.S. at 47-48).

The parties will thoroughly address the merits of the particular dispute: whether the government is speaking when it displays permanent monuments it owns, even if attributed to a donor. Boy Scouts submits this brief out of concern for the potential effects beyond the monument at issue here. In particular, care must be taken to avoid blanket conclusions about public parks, the quintessential traditional public forum for speech, *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515-16 (1939), and the numerous other government forums — including school meeting rooms, government charitable campaigns, and other property — in which private expression is protected.

B. The First Amendment Protects Expression In A Wide Variety Of Forums

In recent years, an ever-increasing number of state and local laws have expanded to cover more protected categories. Government officials of all kinds — state officers, public university officials, and school boards — have been excluding religious and other groups from access to facilities and programs on account of their religious or moral values and their efforts to maintain their distinctive identities. *See* Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369-70 (1994). As a result, there have been increasing challenges to organizations with traditional values in the public domain.

This Court and the Courts of Appeals have recognized a wide variety of government forums. Participants in these forums are protected under the First Amendment against government viewpoint discrimination. *See, e.g., Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 801 (1985). The myriad forums include:

- **Student publications**. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831-32 (1995).

- **School meeting rooms**. *Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001); *Lamb's Chapel v. Center Moriches Union Free*

School District, 508 U.S. 384, 393-94 (1993); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

- **Courthouses and their grounds**. *Huminski v. Corsones*, 396 F.3d 53, 90-92 (2d Cir. 2005); *Sammartano v. First Judicial District Court*, 303 F.3d 959, 966 (9th Cir. 2002); *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999); *Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997), *cert. denied*, 523 U.S. 1023 (1998); *United States v. Gilbert*, 920 F.2d 878, 884 (11th Cir. 1991).

- **Charitable campaigns**. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 801 (1985); *but see Boy Scouts of America v. Wyman*, 335 F.3d 80, 95 n.8 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004).

- **Highway overpass fences**. *Brown v. California Department of Transportation*, 321 F.3d 1217, 1221-25 (9th Cir. 2003).

- **Vanity license plates**. *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002).

- **Adopt-a-highway programs**. *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005); *Cuffley v. Mickes*, 208 F.3d 702, 712 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001).

- **Aerial advertisements.** *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910, 919-20 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 730 (2006).

- **Welfare office waiting rooms.** *Make The Road by Walking, Inc. v. Turner*, 378 F.3d 133, 145 (2d Cir. 2004).

- **State bar journals.** *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 381 (5th Cir. 1989).

- **Bus shelter advertising space.** *Metro Display Advertising, Inc. v. Victorville*, 143 F.3d 1191, 1195-96 (9th Cir. 1998).

- **Fence around high school baseball park.** *DiLoreto v. Downey Unified School District*, 196 F.3d 958, 967 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000).

As a result of a well-developed web of government forum jurisprudence, participants in these forums have an expectation that their expression will be protected from viewpoint discrimination by the government. Regardless of the outcome, the resolution of this case involving a municipality's display of a permanent monument it owns should not encroach on the jurisprudence that protects numerous organizations and individuals in these and innumerable other government forums.

C. Boy Scouts Faces Discrimination In Government Forums

Boy Scouts participates in many government forums across the country. The primary examples are where governments have a practice or policy of leasing property to numerous community organizations so that they might engage in expressive activity and, in some circumstances, provide benefits to the rest of the community. The campground or aquatic center in San Diego, the berth space in the marina in Berkeley, the school in Broward County, and the park building in Philadelphia all provide opportunities to engage in expressive activity with the aim of instilling the values of the Scout Oath and Law. The other organizations that lease space in these cities also use properties for their expressive association. All are government forums.

Following this Court's decision in *Dale*, Boy Scouts has been actively defending its ability to participate in government forums across the country, with mixed results. Several of the cases have concluded, but two are currently pending before federal courts.

1. Pending Cases

For the past eight years, Boy Scouts has been defending two leases in San Diego. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1263 (S.D. Cal. 2003), *certifying questions*, ___ F.3d ___, Nos. 04-55732 & 04-56167, 2008 WL 2415079, *2-*3, 2008 U.S. App. LEXIS 12422, *6-*9 (9th Cir. June 11, 2008). Boy Scouts developed on City parkland and operated at no cost to the City of San Diego a campground and an

aquatic center open to all San Diego youth groups. Notwithstanding that the City has similar nominal-rent leases of City land with over 100 nonprofits — including churches — the district court revoked Boy Scouts' leases under the Establishment Clause and rejected Boy Scouts' viewpoint discrimination defense. On December 18, 2006, the Ninth Circuit certified several questions of California state law to the California Supreme Court, *Barnes-Wallace v. Boy Scouts of America*, 471 F.3d 1038 (9th Cir. 2006), and Boy Scouts petitioned for rehearing. On June 11, 2008, the Ninth Circuit granted rehearing — by correcting factual misstatements and changing the theory of Article III standing — but again certified the same questions to the California Supreme Court. *See* 2008 WL 2415079, *1, 2008 U.S. App. LEXIS 12422, *2-*3. One of the three judges filed a concurring opinion, in which she compared Boy Scouts' values with the "Jim Crow South." 2008 WL 2415079, *11, 2008 U.S. App. LEXIS 12422, *35-*36. The dissenting judge criticized the comparison of the lesbian and agnostic plaintiffs who have "full, open, and totally nondiscriminatory access" to the facilities managed by Boy Scouts with "the treatment of black people in the Jim Crow South" as "obscene." 2008 WL 2415079, *17 n.27, 2008 U.S. App. LEXIS 12422, *56 n.27.

Last month, Boy Scouts sued the City of Philadelphia to protect its rights in a long-standing dispute. *Cradle of Liberty Council, Boy Scouts of America v. Philadelphia*, No. 08-CV-02429-RB (E.D. Pa. filed May 23, 2008). In Philadelphia, over 75 community organizations have $1-a-year leases from the City, including Boy Scouts and several religious groups. In 2003, the City threatened Boy Scouts with eviction

because of its constitutionally-protected membership requirements. The City gave Scouts an ultimatum of changing its internal membership policies, paying punitive rent. or vacating the building that Boy Scouts constructed at its expense in 1930 on City property. *See* Joseph A. Slobodzian, *Boy Scouts Sue City in Building Dispute*, Philadelphia Inquirer, May 28, 2008 at B01. Boy Scouts had to sue the City to protect its ability to participate in the forum established by the City.

2. Concluded Cases

In *Evans v. Berkeley*, 129 P.3d 394 (Cal.), *cert. denied*, 127 S. Ct. 434 (2006), the City of Berkeley has a program of allowing free berthing space in the City marina to nonprofits engaged in projects beneficial to the community. The Berkeley Sea Scouts, which includes many disadvantaged youth, had been granted free berthing space for 60 years. Other groups enjoying free space include a club providing a women's sailing clinic, an association of disabled sailors, and an organization operating a youth program. The City applied the marina's nondiscrimination ordinance only to Boy Scouts' policy with respect to open homosexuals, even though the ordinance also covers sex, age, and disability discrimination. The California Supreme Court rejected the Berkeley Sea Scouts' First Amendment challenge to the City's exclusion. As a result, Boy Scouts is excluded from the forum.

In *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004), the State of Connecticut excluded Boy Scouts from a charitable campaign in which 900 groups of all different kinds participate solely because of Boy Scouts' constitutionally-protected views and leadership policies. Boy Scout councils had participated in the campaign for 30 years. The Second Circuit recognized that the Boy Scouts' policies were "constitutionally protected" but nonetheless upheld the notion that Boy Scouts should "pay[] a price" for "exercising its First Amendment rights." *Id.* at 95 n.8. As a result, Boy Scouts is excluded from the forum.

In *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001), Boy Scout groups in Broward County had been permitted to make use of public school facilities after-hours for many years. But, after *Dale*, "the School Board . . . concluded that *the Scouts are ineligible to rent and lease school facilities like any other private group* because the Scouts' membership policies" violated the School Board's anti-discrimination policy. *Id.* at 1297 (emphasis added). The district court entered a preliminary injunction against the school board. The injunction was later converted to a permanent injunction on consent.

CONCLUSION

For the foregoing reasons, the resolution of this case should not extend beyond the city-owned permanent monument at issue here.

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AMICUS CURIAE BRIEF

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PLEASANT GROVE CITY, UTAH, ET AL.,
Petitioner,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CENTER FOR INQUIRY AND THE COUNCIL FOR SECULAR HUMANISM AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICI CURIAE*

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. The Council for Secular Humanism ("CSH") is an affiliate of CFI. Through education, research, publishing, social services, and other activities, including litigation, CFI and CSH encourage evidence-based inquiry into science, pseudoscience, religion, and ethics. CFI and CSH believe that the separation of Church and State is vital to the maintenance of a free society that allows for a reasoned exchange of ideas, and have participated as *amici curiae* in several Establishment Clause cases before this Court. The *amici* have submitted this brief to ensure that in addressing the Free Speech Clause issues presented by this case, the Court remains cognizant of the importance of maintaining the boundaries between Church and State that are an essential part of our free society.[1]

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[1] The parties have filed with the Clerk blanket consents to the filing of *amici curiae* briefs. No party, counsel for a party, or person other than CFI, CSH, their employees, or their counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

This case involves permanent free-standing religious monuments on government property. Although the placement of these monuments raises difficult questions under the Establishment Clause of the First Amendment, the parties have framed their dispute here and in the courts below solely in terms of the Free Speech Clause. Further, based on the record before them, the courts have ruled on the basis of the Free Speech Clause alone. *Amici* are concerned that, irrespective of how the Court decides the Free Speech issues, its ruling could be misconstrued as a *sub silentio* holding that the installation of privately donated religious monuments on public grounds does not violate the Establishment Clause. Accordingly, *amici* urge this Court to craft a narrow opinion stating explicitly that it does not reach, and makes no implicit holding with respect to, any undeclared Establishment Clause issues.

ARGUMENT

I. This Case Presents No Justiciable Establishment Clause Issues.

At no point in this litigation has either party raised, or any court decided, whether the Establishment Clause permits a city to place one religion's monument on public grounds while rejecting another's. Where, as here, an issue has not been raised by the parties or addressed by courts below, this Court has always taken care to avoid reaching the issue or expressing an advisory opinion.

This is particularly true in the Establishment Clause context because the adjudication of such questions requires a well-developed factual record regarding the Establishment Clause issues—a record that simply does not exist here.

A. The Parties Have Not Briefed—And The Lower Courts Have Not Ruled On—Any Establishment Clause Issues.

Despite the religious nature of the speech at issue here, neither Pleasant Grove nor Summum has asked this Court to consider what impact, if any, its Establishment Clause jurisprudence might have on the outcome of this case. Those issues are not before this Court now and have never been a part of this case.

Respondent Summum, a corporate sole and church ("Summum" or "the church"), brought this action alleging that the City of Pleasant Grove ("the City") violated its First Amendment right to free speech by refusing to erect a privately donated monument of Summum's Seven Aphorisms next to a similarly sized, privately donated monument of the Judaic and Christian Ten Commandments. J.A. 11-23. Although Summum raised additional state law claims, including one premised on the establishment clause of the Utah state constitution, it did not include any claim under the Establishment Clause of the First Amendment in its complaint.

Summum's omission of a federal Establishment Clause claim was no accident. In its motion for preliminary injunction—the only part of this case

now on appeal—Summum argued that the City had "created a public forum for the display of permanent monuments" within which the City could not discriminate between speakers on the basis of content. Pl. Mem. in Support of Mot. for Partial S.J. & Mot. for Prelim. Inj. at 2-3. Summum could have raised its Utah establishment clause argument in that motion, as it did in its concurrent motion for partial summary judgment. *Id.* at 7. But the church chose instead to focus exclusively on its Free Speech arguments at the preliminary injunction stage, perhaps because violations of the right to Free Speech are presumptively irreparable. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003).

Similarly, the City chose not to assert either the Utah or federal Establishment Clauses in defense of its restrictions on Summum's speech rights. Indeed, in its opposition to Summum's concurrent motion for partial summary judgment, which is not before this Court on appeal, the City specifically asked the district court not to "wade into an area of *state* constitutional law described by the Tenth Circuit as 'novel,' 'complex,' and 'evolving.'" Def. Resp. to Pl. Mot. for Partial S.J. at 9 (emphasis added). And when the City moved for rehearing en banc before the Tenth Circuit, it did so under the government speech doctrine, rather than on any Establishment Clause ground.

Consistent with the claims and defenses raised by the parties, none of the courts to hear or review Summum's motion for preliminary injunction has

based its decision in whole or in part on the Establishment Clause. At oral argument on Summum's motion for a preliminary injunction, the District Court asked no questions about the Utah or federal Establishment Clauses, and made no mention of either in its oral order denying preliminary relief. Pet. App. 3b-4b. When the Tenth Circuit panel reversed the District Court and ordered the injunctive relief on which certiorari has been granted, it did so pursuant to public forum analysis under the Free Speech Clause. Pet. App. 8a-20a. In his dissent from the Circuit's denial of rehearing en banc, Judge McConnell noted that accepting Pleasant Grove's argument that the Ten Commandments monument constituted government speech "does not mean that the Ten Commandments monuments . . . are immune to First Amendment challenge." Pet. App. 16f. He added, "Rather, as government speech, they may be challenged by appropriate plaintiffs under the Establishment Clause . . . . We have no occasion here to speculate on the outcome of any such litigation." *Id.*

B. The Rules And Prudential Doctrines Of This Court Counsel Against Reaching Establishment Clause Issues That Were Not Raised Or Briefed By The Parties.

Where, as here, an issue has not been raised by the parties or addressed by the courts below, this Court has always taken care to avoid reaching the issue or expressing an advisory opinion. Indeed, it would run counter to this Court's rules and prudential doctrines to address latent Establishment

Clause issues on appeal. Supreme Court Rule 14(a) provides that, "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Moreover, the questions presented in the petition generally must have been raised below even to be considered on appeal. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) (quoting *Duignan*).

Although this case implicates more than one clause of the First Amendment, this Court should adhere to the same prudential doctrine that guided its decision in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995) by limiting its constitutional holdings, if any, to the issues on which it granted certiorari. In doing so, it should note explicitly that it expresses no opinion on any other constitutional claim or defense that might otherwise have affected its decision.

In *Pinette*, effectively a mirror image of the case at hand, the Ku Klux Klan sued the Advisory Board of the public plaza surrounding the Ohio state capitol for denying its request to erect a cross in the plaza in December 1993. 515 U.S. at 758-59. Although the Board approved the placement of a Christmas tree and a menorah on the plaza, it argued that permitting the Klan to erect a cross on state grounds would violate the Establishment Clause. *Id.* The United States District Court for the Southern District of Ohio disagreed, ordering the Board to permit the Klan to erect its cross. *Id.* at 759. After the Sixth Circuit affirmed, this Court granted

certiorari to resolve a circuit split on whether the Establishment Clause permits private, unattended religious displays on public grounds. *Id.* In its merits brief, the Klan argued that the Board's Establishment Clause justification for denying its request was a façade for the Board's disapproval of the Klan's political message. *Id.* at 759-60. This Court declined to address the Klan's Free Speech arguments, however, noting:

> Whatever the fact may be, the case was not presented and decided [on Speech grounds]. The record facts before us and the opinions below address only the Establishment Clause issue; that is the question upon which we granted certiorari; and that is the sole question before us to decide.

Id. at 760 (footnote omitted). *Pinette* represents this Court's regular practice.[2]

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[2] Just this term, the Court has declined on several occasions to consider issues raised or implied for the first time in the parties' merits briefs. *See, e.g., Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1407 (2008) ("The parties' supplemental arguments . . . implicate issues of waiver and the relation of the FAA both to Rule 16 and the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 et seq., none of which has been considered previously in this litigation, or could be well addressed for the first time here. We express no opinion on these matters beyond leaving them open for Hall Street to press on remand."); *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue*, 128 S. Ct. 1498, 1508 (2008) (expressing no opinion whether Mead and Lexis formed a unitary business, despite trial court's finding in the negative, because court of appeals had not yet passed on that issue); *Danforth v. Minnesota*, 128 S. Ct. 1029, 1034 n.4 (2008) ("We note at the

Moreover, this Court's prudential doctrine of avoiding issues not raised below is especially compelling in the Establishment Clause setting because, as the Court has repeatedly recognized, Establishment Clause questions are extremely fact-sensitive. They require careful examination of the challenged practices' precise characteristics, enactment, history, application, and social context. *See, e.g.*, *Pinette*, 515 U.S. at 778 (O'Connor, J.,

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outset that this case does not present [retroactivity] questions . . . . Accordingly, we express no opinion on these issues."). For a sampling of older cases in which this Court reserved judgment on issues not properly raised by the parties, *see Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 430-31 (2002) ("At the outset, we note it is an open question whether FERPA provides private parties, like respondent, with a cause of action enforceable under § 1983. . . . The parties . . . did not contest the § 1983 issue before the Court of Appeals . . . . and petitioners did not seek certiorari on the question. We need not resolve the question here as it is our practice 'to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari.'") (quoting *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998)); *Hudson v. McMillian*, 503 U.S. 1, 12 (1992) ("To the extent that respondents rely on the unauthorized nature of their acts, they make a claim not addressed by the Fifth Circuit, not presented by the question on which we granted certiorari, and, accordingly, not before this Court."); *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) ("The State contends that, even if Officer Nelson's search violated the Fourth Amendment, the court below should have admitted the evidence thus obtained under the 'good faith' exception to the exclusionary rule. That was not the question on which certiorari was granted, and we decline to consider it."); *Davis v. Passman*, 442 U.S. 228, 249 (1979) ("The Court of Appeals did not consider . . . whether respondent's conduct was shielded by the Speech or Debate Clause of the Constitution. Accordingly, we do not reach this question.").

concurring in part and concurring in judgment) ("[T]his question cannot be answered in the abstract, but instead requires courts to examine the history and administration of a particular practice . . . ."); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989) (opinion of Blackmun, J.) ("That inquiry, of necessity, turns upon the context in which the contested object appears . . . ."); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application."). The latent Establishment Clause questions in this case cannot be answered in the abstract, but rather would require delving deep into the particular facts of the Ten Commandments and Seven Aphorism monuments—facts the parties have not placed into the record because they have framed their dispute exclusively in terms of the Speech Clause.

The procedural history and the reasoning of this Court's two most recent Ten Commandments decisions further illustrate the problems with issuing any Establishment Clause ruling here. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005). In *McCreary County*, the validity under the Establishment Clause of the courthouses' Ten Commandments displays was the central issue throughout the litigation. The District Court conducted extensive fact-finding; both it and the Sixth Circuit addressed the Establishment Clause merits in their decisions; and all four of the

questions presented in the petition for a writ of certiorari involved the Establishment Clause. *See* Pet. for Writ of Certiorari, at i, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (No. 03-1693), *available at* 2004 WL 1427470. Likewise, this Court's opinion was highly sensitive to the particular facts presented in the record. The Court described the proceedings below and the various versions of the displays at great length. *See* 545 U.S. at 851-59. It acknowledged that "Establishment Clause doctrine lacks the comfort of categorical absolutes," *id.* at 859 n.10, and that "under the Establishment Clause detail is key," *id.* at 867. Finally, the Court's conclusion that the displays were unconstitutional rested largely on the complicated history of the displays, *see id.* at 868-74, and the fact that two lower courts had already found that they were erected with an illegitimate religious purpose, *see id.* at 871.

Similarly, in *Van Orden*, the sole issue on which certiorari was granted was the constitutionality under the Establishment Clause of a Ten Commandments monument, *see* Pet. for Writ of Certiorari, at i, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500), *available at* 2004 WL 972724, just as this issue was the focus of the district court's trial and the Fifth Circuit's decision. The Court again displayed a heightened sensitivity to the challenged monument's particular characteristics and history. *See* 545 U.S. at 690-91 (plurality opinion) (distinguishing earlier decision that barred posting of Ten Commandments in public schoolrooms). Justice Breyer's concurrence, in

particular, stressed the difficult and fact-specific nature of many Establishment Clause cases. "[N]o exact formula can dictate a resolution to such fact-intensive cases." *Id.* at 700 (Breyer, J., concurring in judgment). Justice Breyer concluded that the monument at issue was constitutional only after painstakingly analyzing "[t]he circumstances surrounding the display's placement on the capitol grounds," "its physical setting," and its "40-year history on the Texas state grounds." *Id.* at 701 (Breyer, J., concurring in judgment).

In contrast to *McCreary County* and *Van Orden*, the parties and courts below did not develop facts relevant to the Establishment Clause inquiry in this case. Given the Establishment Clause's notorious status as an area of the law where "detail is key," *McCreary County*, 545 U.S. at 867, and "difficult borderlines cases" abound, *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in judgment), the Court should refrain from deciding any Establishment Clause issues here.

II. A Decision On The Free Speech Issues Could Be Misconstrued As An Implicit Establishment Clause Holding.

Although the difficult Establishment Clause issues raised by this case are not before the Court, a ruling in favor of either party may be misconstrued as tacit approval for the installation of religious monuments on public grounds. To avoid such a misreading of its decision, the Court should state, in clear and unmistakable terms, that it is deciding

only the Free Speech questions presented and that no Establishment Clause implications should be read into its decision.

A. A Decision In Favor Of Petitioner Could Be Misconstrued As An Implicit Holding That The Ten Commandments Monument Does Not Violate The Establishment Clause.

If the Court embraces the City's argument that the Ten Commandments monument constitutes "government speech," the Court should make clear that it does not reach the question of whether the government speech in this case amounts to an endorsement of religion in violation of the Establishment Clause.

The fact that the Free Speech Clause does not require government speech to adhere to viewpoint neutrality does not automatically insulate government speech from challenge under other constitutional provisions. For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court separately considered (1) whether the government's funding subsidies constituted government speech for purposes of the First Amendment, and (2) whether those funding subsidies violated substantive due process rights under the Fifth Amendment. *Compare id.* at 192-200 (discussing Free Speech challenge), *with id.* at 201-03 (discussing Fifth Amendment challenge). Similarly, in this case, whether the Ten Commandments monument constitutes government speech for purposes of the Free Speech Clause is analytically distinct from

whether that speech violates the Establishment Clause.

Alternatively, if the Court decides in favor of Petitioner by determining that the Pleasant Grove park is not a public forum, the Court should make clear that it does not reach the question of whether granting preferential access to the Ten Commandments while denying access to the Seven Aphorisms violates the Establishment Clause. Separate and apart from the Free Speech concerns presented by such unequal treatment, "giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause." *Pinette*, 515 U.S. at 766 (plurality opinion).

The Court should ensure that any decision in favor of Petitioner is narrowly crafted to avoid expressing an opinion, either directly or *sub silentio*, on the constitutionality of Pleasant Grove's policy under the Establishment Clause.

B. A Decision In Favor Of Respondent Could Be Misconstrued As An Implicit Holding That The Seven Aphorisms Monument Does Not Violate The Establishment Clause.

A loosely-worded decision in favor of Summum might also incorrectly suggest implicit resolution of difficult Establishment Clause questions that deserve full treatment upon full briefing and a full record. The Court should avoid reaching these questions and proceed with "caution" when

"approving the order of a federal judge commanding a State to authorize the placement of freestanding religious symbols in front of the seat of its government." *Pinette*, 515 U.S. at 815 (Stevens, J., dissenting).

If the Court concludes that the Ten Commandments and Seven Aphorisms monuments are both private speech, the Court should make clear that it does not reach the question of whether these religious displays nevertheless violate the Establishment Clause when permanently erected on public grounds. This Court has "never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 n.13 (2000). Private religious displays can still create an effect of unconstitutional endorsement if they "so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval." *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in judgment); *see also id.* at 792 (Souter, J., concurring in part and concurring in judgment) (stating that the government may not "contract out its establishment of religion").

If the Ten Commandments or the Seven Aphorisms constitute sectarian religious speech, then a policy of equal access may exacerbate the Establishment Clause problems. "[T]he fact that the State has placed its stamp of approval on two different religions instead of one only compounds the constitutional violation." 515 U.S. at 809 (Stevens,

J., dissenting); *cf. County of Allegheny*, 492 U.S. at 615 (opinion of Blackmun, J.) ("The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone."). The Court should thus make clear that a ruling that allows Summum to place the Seven Aphorisms monument next to the Ten Commandments monument does not foreclose a future Establishment Clause challenge against one or both of those monuments.

CONCLUSION

This case presents no occasion for the Court to depart from its usual practice of deciding only those issues raised in the parties' briefs and passed on by the courts below. *Amici* therefore urge the Court to consider only the Speech Clause issues on which it granted certiorari and craft a narrow opinion emphasizing that it does not reach, and makes no implicit holding with respect to, any undeclared Establishment Clause issues.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

PLEASANT GROVE CITY, et al.,

Petitioners,

v.

SUMMUM,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF THE CITIES OF CASPER, WYOMING; CITY OF NORMAN, OKLAHOMA; CITY OF INDIANAPOLIS, INDIANA; CITY OF OGDEN, UTAH; CITY OF LAWTON, OKLAHOMA; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; CITY OF PROVO, UTAH; CITY OF BISMARCK, NORTH DAKOTA; AND CITY OF COLORADO SPRINGS, COLORADO IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICI[1]

The amici curiae request that this Court reverse the decision below because each amicus confronts the unnecessary and undesirable results that follow from the Tenth Circuit's over-extension of this Court's public forum doctrine. As a result of the decision below, each amici will be forced to choose between removing works it has accepted and displayed to promote its lawful governmental objectives or allowing its public places to serve as the forum for display of works by private citizens without regard for whether those works promote the common good. The amici respectfully submit that this Court's precedent does not support the rule laid down by the Tenth Circuit, which results in a finding that any placement of private works by a governmental body either yields control of public spaces to private citizens or makes every citizen an iconoclast with power to require removal of all such works from public spaces under pain of burdensome litigation.

Casper, Wyoming, provides the starkest example of the egregious consequences of the decision below. It is a city of approximately fifty thousand located in the Rocky Mountains in the middle of the State of

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[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Wyoming. The city accepted a Ten Commandments monument donated by the Fraternal Order of Eagles in 1965. It is also the birthplace and resting-place of Matthew K. Shepard. In a way that neither this Court nor the City of Caspar could ever have imagined, these two simple facts have converged to make Casper Wyoming a perfect example of the egregious harm resulting from the decision below.

The Casper City Council dedicated an Historical Monument Plaza on July 16, 2007. The plaza consists of stone monuments depicting the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Preamble to the United States Constitution, the Bill of Rights, and the Ten Commandments, along with plaques describing the historical significance of these documents. The city controls the plaza and determines what monuments may be placed there. But the City's Monument Plaza includes a Ten Commandments monument donated to the city by the Fraternal Order of Eagles in 1965.

When the city's plan to create its Historic Monument Park was announced, Fred Phelps, pastor of the Westboro Baptist Church, demanded the right, under the Tenth Circuit's decision in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), to place a Matthew Shepard Monument in City Park.

The so-called Shepard Monument would read as follows:

> MATTHEW SHEPARD Entered Hell October 12, 1998, in Defiance of God's Warning 'thou

> shalt not lie with mankind as with womankind; it is abomination.' Leviticus 18:22.

The city refused Pastor Phelp's request.

Now the city has to confront the horrific possibility that its decision to incorporate the Ten Commandments monument donated by the Eagles into the City's Historic Monument Plaza means that it must also allow Pastor Phelps to add his Matthew Shepard Monument. The city dreads that prospect for reasons any person who values civility can easily understand.

The cities of Ogden, and Provo, Utah, starkly illustrate the real range of choice created by the decision below. Like Casper, both Ogden and Provo accepted a Ten Commandments monument from the Fraternal Order of the Eagles. When Summum sued Ogden to force placement of its monument, the city resisted – until the Tenth Circuit informed the city it had created a public forum and must allow placement of Summum's monument in *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002). Confronted with the implications of the Tenth Circuit's decision, Ogden removed the work and "closed" the "forum" it was said to have opened. After the Tenth Circuit's decision, Provo decided to give its monument away rather than relinquishing control of its public spaces.

The other amici all fear that they will be forced to wrestle with the problems confronted by Casper, Ogden, and Provo – and believe they should not be required to do so. Norman, Oklahoma, is a city of

approximately 111,000, located in the heart of the state just south of Oklahoma City. This summer it begins construction of its Cleveland County Veteran's Memorial, to honor the service and sacrifice of veterans who have served our country from World War I to the present. The memorial is being built with private funds but will be located in a city park. Norman also has an art program through which it displays art throughout the city. Norman does not believe it should be forced to open its parks and public spaces to displays by private citizens simply because it takes private funds to build a veteran's memorial or decides to enrich community life by placing private works in its public spaces.

Indianapolis, Indiana, is a city of approximately 800,000 and is the state capital of Indiana. Aside from hundreds of other fixed displays, such as the Indiana War Memorial and the memorial to Martin Luther King, Jr., Indianapolis has approximately 150 miles of greenways and interconnected trails. These trails are designed to promote commuting, exercise, and alternative means of transportation throughout Indianapolis and Marion County.

Several of these trails connect to cultural district, with one predominate link, the "Cultural Trail."[2] The Cultural Trail combines a means of alternative transportation with a focus on art representative of the

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[2] More information on the Cultural Trail, including the existing fixed displays, can be found at http://www.indyculturaltrail. info/.

Indianapolis' cultural mosaic displayed along the trail. The fixed-display art is submitted for review and approval to the Arts Council of Indianapolis – a not-for-profit organization funded predominantly by public city, county or state monies – before placement. The first fix displays have been erected within the walk or in close proximity to the pathway, and the displays have no message.

Affirming the Tenth Circuit presents Indianapolis with a Hobson's choice: 1) choosing a certain number for each public fora leaving certain groups and their messages without a venue, resulting in a disparate impact on certain messages and inviting litigation; or 2) removing all displays throughout Indianapolis. What was an innocent attempt to encourage message-free art now could become a trail that merely invites litigation at every turn.

Indianapolis does not believe it should be forced to recognize each public place where a fixed display currently resides as public fora for fixed displays. Legitimate public safety and aesthetic concerns are undermined by the Tenth Circuit's holding. Under the Tenth Circuit's approach, Indianapolis has inadvertently created hundreds of forums for private speech on public property. Such an absurd result would leave Indianapolis but one choice: remove all displays throughout Indianapolis. The City respectfully submits that it should not be forced to this choice.

The City of Lawton, Oklahoma, also appears to urge reversal of the decision below. Lawton is the home of Fort Sill, at one time the home of the famous Seventh Calvary, now the United States Army Training Facility for the Field Artillery, including most recently, the Air Defense Artillery. The city has over 108 public parks, many of them containing memorials, to those who have served our country in the United States Military. Many of these memorials were donated to the city by private groups. The city does not believe that its decision to accept these monuments and display them in furtherance of its legitimate government purpose – to inspire patriotism and gratitude for military service – should require it to open its public spaces to displays expressing the views of private citizens.

The Metropolitan Government of Nashville and Davidson County, Tennessee, and the cities of Bismarck, North Dakota, and Colorado Springs, Colorado, join the brief for the same reasons of the other amici. Taken together they fear the adverse consequences that the decision below will have on their ability to accept and display artwork or monuments that promote the civil life of their communities. Like the other amici, they urge this Court to reverse the decision below so that they will not have to confront demands for placement of private works in their public spaces or stripping their public spaces of such works in order to retain control over public property.

REASONS FOR GRANTING THE PETITION

As an initial matter, the amici curiae state their agreement with the Petitioners before the Court as well as the dissenters below insofar as they argue that neither precedent nor common sense recommend the conclusion that public parks are traditional public forums for the purpose of private speech communicated by means of a *permanent display*. The dissenters below fully explain why this Court's decisions do not support the notion that traditional public forums have traditionally been forums for *private* speech communicated by means of *permanent* display. The Petitioners highlight the way in which this ahistorical assertion conflicts with sister-circuits that have rejected this unwarranted extension of public forum doctrine as well as the farfetched notion that *governmental* display of monuments donated by private parties can be realistically characterized as *private* speech.

The amici write to emphasize a distinct but related way in which the decision below is inconsistent with the decisions of this Court. More specifically, the amici write to make explicit the way in which the decision below relied upon the two erroneous conclusions noted above, to justify a third "ultimate conclusion," *i.e.*, the conclusion that the *government's* acceptance and display of works donated by *private* parties, requires the finding that the government has created a forum for *permanent* display by *private* citizens.

In this way, the decision below creates what amounts to an imputed intent to *expand* a traditional public forum to include *permanent display by private citizens* based on nothing more than the decision by a governmental body to accept and display a work donated by a private citizen. Such a finding of governmental intent based on nothing more than the display of works donated by private parties is wholly inconsistent with legal principles that this Court has developed to determine when action by government officials is sufficient to support a finding that the government has intentionally opened a public forum. And such an extension of this Court's decisions is plainly undesirable because it undercuts the ability of government to engage in speech that is designed to serve a community's needs or aspirations. Worse still, the decision below virtually guarantees that public officials will be saddled with burdensome litigation as they try to discern the anything but clear line between governmental speech by means of its display, unintentional creation of a public forum for private speech, and impermissible governmental "endorsement" of private religious speech in public forums said to violate the Establishment Clause. For all these reasons, the amici request that the decision below be reversed and that this Court make plain that the display of works by governmental bodies is governmental speech.

I. The Decision Below Represents An Unthinking Over-Extension Of This Court's Forum Doctrine That Has Highly Undesirable Consequences For Civic Life.

Traditional public fora *have not been traditionally regarded as fora for permanent speech by private citizens*. Thus, it is clear that the decision below represents an extension of this Court's precedent – an implicit finding that the Petitioners intended to *expand* traditional public forums to make them serve as forums for *permanent* speech by private citizens. Precisely because the decision below really turns on this implicit finding of intent to expand a traditional public forum, it is plain that the most relevant precedent from this Court is provided by cases concerning the kind of government action that *designates* public property that is *a nontraditional forum* as a public forum nonetheless. As demonstrated below, this Court's decisions have uniformly emphasized that an intent to create a forum should only be found where the undisputed facts provide clear evidence of such intent. Because there is no basis for such a finding of intent to open (or, in this case, expand) a forum here, it is clear that the decision below arises from an unjustified extension of this Court's prior decisions that should be rejected.

Early on, this Court rejected the claims that public property was necessarily a forum for even *temporary* speech by *private* citizens, recognizing that "were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military

compounds and other facilities would immediately become Hyde Parks open to every would-be pamphleteer and politician. This the constitution does not require." *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 435 U.S. 114, 130 n. 6 (1981).

In the same vein, this Court has noted that "forum analysis is not completed merely by identifying the property at issue. Rather, in defining the forum we have focused on the *access sought by the speaker.*" *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 801 (1985). Emphasizing that "government does not create a public forum by inaction . . . but only by intentionally opening a nontraditional forum for public discourse," the Court refused to find that the Combined Federal Campaign was a public forum, even though the campaign had been opened to a variety of speakers, because "the Court has examined the nature of the property and its compatibility with expressive activity to discern the government's intent." *Id.* at 803 (relying on numerous cases where the *government's control of access* to the forum had led the Court to negate claims for *access*) (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Greer v. Spock*, 424 U.S. 828 (1976); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)).

Likewise, in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), this Court rejected a claim that a student newspaper was a public forum, even though students were allowed to express a great

many views therein. In so doing it stated that "[i]f the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created. . . ." *Id.* at 267. Relying on evidence of ongoing government control over the student newspaper, the Court found that the evidence that students had some ability to express their views could not support a finding that the school had created a public forum in the school newspaper.

Similarly in *Arkansas Educ. Tele. v. Forbes*, 523 U.S. 666, 672-73 (1998), this Court declined to find that public television was a public forum. In so doing, the Court reasoned that "[h]aving first arisen in the context of streets and parks, the public forum should not be extended in a mechanical way to the very different context of public television." But once the superficial (and ahistorical) view of traditional public forums advanced by the decision below is set aside, it is clear that the Tenth Circuit's claim that traditional public forums are forums for *permanent speech by private citizens* rests largely on just such a mechanical extension of traditional public forum doctrine.

The decision below points to nothing that might suggest that government relinquished control over placement of *permanent* displays in either of the parks at issue here. This brings into focus the heart of the decision below – an implicit finding of a government *intent to expand a traditional forum* to make it one for *permanent speech by private citizens* based on nothing more than the *government's* display of a *work* donated by a private party.

The amici respectfully submit that this Court has never found an intent to create (in this case, *expand*) a forum based on such slim indicia. Indeed, such a finding is directly at odds with this Court's longstanding approach whereby the "government does not create a public forum by inaction or by permitting limited discourse but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. Such a finding is also at odds with experience, for there is no question that governmental entities have always exercised control over *permanent* display in public parks and other public spaces.

The opinion written separately by Judge Tacha in response to the dissenters below demonstrates the importance of the forum determination (and related over-extension) of this Court's precedent – emphasized here. In her response to the dissenting opinions, Judge Tacha first cites decisions concerning the placement of *private property* in a public forum. *See* 499 F.3d 1170, 1178 (10th Cir. 2007) (opinion by Tacha, J.), (*citing City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (dealing with news racks), and *Capitol Square Review & Advisory Board. v. Pinette*, 515 U.S. 753 (1995) (cross owned by private organization). She then relies on cases *rejecting* claims that *private* parties required to support government speech are being forced to engage in *private* speech that agrees with the government (on the theory that regulatory exactions used to support *government* speech amount to coerced *private* speech). *Id.* at 1180 (*citing Johanns*

v. Livestock Marketing Ass'n, 544 U.S. 550 (2005)). Based on these cases, and this Court's "focus on whether the message is the government's own," Judge Tacha asserts that a "city's control over a physical monument does not therefore transform the message inscribed on the monument into city speech. If this were true, the government could accept any private message as its own without subjecting the message to the political process, a result that would shield government from First Amendment scrutiny and democratic accountability." *Id.* at 1180.

Judge Tacha's arguments are not supported by the precedent cited, do not withstand scrutiny, and amount to a dangerous extension of this Court's precedent. None of the cases cited by Judge Tacha require a finding that a traditional public forum is a forum for *permanent* display (speech) by *private* citizens. None of the cases relied upon by Judge Tacha require a finding that the *government's* display of works donated by private parties must, by operation of law, be deemed *private* (as opposed to government) speech. The claim that the *government's* display of a work donated by private parties must be considered *private* speech simply begs the question – why would anyone reach that conclusion? And Judge Tacha's rationale for the extension of precedent (*i.e.*, the notion that if governmental display of works donated by private citizens is treated as government speech, the matter is somehow exempted from the political process) simply defies reason; given that elected officials make these decisions, how can those

decisions be regarded as exempt from the political process?

Judge Tacha offers a telling illustration in support of the decision below. She seeks to justify the decision on the grounds that treating governmental display of works donated by private parties as government speech must be wrong because this would mean that each book placed in a public library would become government speech (*e.g., The Great Gatsby*). *See Summum v. Pleasant Grove City*, 499 F.3d at 1179. Here it suffices to say that the result Judge Tacha believes compelled by this Court's precedent is, in fact, directly contrary to the commonsense approach taken by this Court, which has reached its conclusions based on a realistic appraisal of the totality of the circumstances, something Judge Tacha acknowledges in her own opinion when referring to "a different line of cases recognizing the government's ability to make content-based judgments when it acts in particular roles (*e.g.*, educator, librarian, broadcaster, and patron of the arts)." *Id.* at 1179-80 & n. 2. The amici respectfully suggest that the decision below is critically flawed precisely because it fails to engage in a realistic appraisal of the situation presented by the *government's* acceptance and *display* of works donated by private parties. As a result, it fails to acknowledge that the *government's* display of works donated by private parties simply represents another way in which *government speaks*; such display is not – and never has been – regarded as a way in which

government demonstrates an intent to open a public forum.

The predicaments faced by the amici demonstrate the intolerable consequences that flow from the decision below. Casper's predicament is the most egregious. The city endeavors to promote civic virtue by directing attention tc fundamental sources of our national heritage. Now it faces the very real prospect of being forced to display a monument condemning one of its inhabitants to Hell simply because the city accepted a monument in 1965 that has been incorporated into a display designed by the City to serve a legitimate civic purpose.

The fate of Ogden and Provo demonstrate the real range of choice available to public bodies who have accepted and displayed private works. Faced with the choice of opening its public spaces to permanent display by anyone, Ogden fought and lost (and removed the monument); Provo learned its lesson and gave its Ten Commandments monuments away. Thus, the range of possible choices is painfully clear – be prepared to make every man the master of public property or make every man an iconoclast under pain of litigation.

And the impact of that Hobson's choice affronts common sense just as it subverts the ability of public officials to promote the common good. There is no reason that the people of Lawton should be required to place pacifist works around Fort Sill, the people of Norman forced to esteem draft-dodgers along with

veterans, or the people of Indianapolis forced to yield their cultural trial to pieces that offend their community, simply because they accepted some private works and chose to display them in public spaces.

The amici respectfully submit that the undesirable consequences they fear are not required by this Supreme Court's decisions. Quite the contrary, those consequences follow only from an ahistorical view of public fora and an unthinking extension of this Court's precedent. The decision below leaves this Court no choice but to make plain the limits that common sense places upon its prior decisions. The amici urge this Court to seize this opportunity before the consequences of the decision below begin to be suffered by their cities and others as well.

II. The Legal Uncertainty Created By The Decision Below Will Result In Burdensome Litigation As Government Officials Try To Draw The Line Between Government Speech, Private Religious Speech, And Government "Endorsement" Of Religion.

By disregarding the obvious fact that the government's display of monuments donated by private parties is governmental speech – not creation of a forum for speech by private citizens – the decision below creates legal uncertainty that exposes municipalities to the burdens of litigation as they try to promote the common good. As the petitioners make plain, the decision below needlessly requires governmental officials to eschew donations of private works,

and to strip their public spaces of such works, or risk litigation about whether other private parties have a right to display their chosen message on public property. As the situation confronted by each of the amici illustrate, the consequences such a rule has for civic life are significant and negative. The uncertainty created by the multi-factor test employed below is a prescription for litigation as each of these cities seeks to ensure that its decision to accept and display works does not expose it to demands for access to public property for the purpose of display by private parties.

Worse still, the uncertainty and risk of litigation arising from the principle underlying the decision below is greatly compounded in cases where the display at issue has a religious dimension. Under the multi-factor test employed by the court below, governmental officials will have to make judgments concerning whether acceptance and display of a given work will be deemed to create a forum for private speech, including religious speech, or whether the display will be deemed government speech and, perhaps, an endorsement of religion.[3]

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[3] The amici respectfully submit that the respondent's claim that the governmental actors can easily avoid doubt by formally "adopting" a monument, see Respondent's Brief In Opposition To Petition For A Writ Of Certiorari, at pp. 31-33, is wholly insupportable given the overall uncertainty of case law in this area. *See e.g., Van Orden v. Perry*, 545 U.S. 677 (2005) (allowing Ten Commandments monument in connection with other monuments of historic significance based in part on noncontroversial

(Continued on following page)

The decision below and dissents from the denial of rehearing *en banc* point to these difficulties. The panel opinion recognized that the petitioner's display of the Ten Commandments was virtually identical to that approved by this Court in *Van Orden v. Perry*, 545 U.S. 677 (2005), but rejected application of *Van Orden* based on its finding that display of the donated monument created a forum for private speech. *Summum*, 483 F.3d at 1048 n. 2. In contrast, two judges dissenting from the decision to deny rehearing *en banc* recognized that once the display is seen as government speech, *Van Orden* controls and the display is lawful. *See Summum*, 499 F.3d at 1175-76 (opinion by McConnell, J. joined by Gorsuch, J.).

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nature of display for extended period); *cf. McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (striking down display of Ten Commandments included in display of other documents of historic significance based on finding that governmental purpose was to emphasize and celebrate the religious dimension of the Ten Commandments); *see also, O'Connor v. Washburn University*, 416 F.3d 1216, 1224 (10th Cir. 2005) (rejecting claim that vulgar depiction of Catholic Bishop violated establishment provision of first amendment and noting that "[i]n any case, the Supreme Court's recent opinions establish that an examination of the government actor's purpose and the particular context of the display remain relevant considerations under the Establishment Clause.") (*citing McCreary and Van Orden*); *Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1241 (10th Cir. 2005) (remanding challenge to Pleasant Grove's inclusion of Ten Commandments in Pioneer Park "[g]iven the myriad factual considerations dictated by the court in Van Orden and McCreary. . . .").

The City of Casper, Wyoming, has experienced the burdens created by such legal uncertainty first-hand. As noted earlier, the City accepted a Ten Commandments monument donated by the Fraternal Order of the Eagles in 1965. In this regard, Casper was no different than other cities that accepted the monuments donated by the Eagles as part of a nationwide effort to inspire young men to live by a moral code. The stand-alone monument was placed in City Park.

Almost forty years later, in September of 2003, the City of Casper received a letter from the Freedom from Religion Foundation, located in Madison, Wisconsin. The foundation demanded that the city remove the Ten Commandments monument from City Park, and it threatened litigation if the city did not comply with the demand.

While the City of Casper tried to address the litigation threat leveled by the Freedom from Religion Foundation, it was forced to contend with another threat of litigation from Pastor Fred Phelps. More specifically, on October 2, 2003, the city received a letter from the Westboro Baptist Church asserting a right to place a Matthew Shepard Monument in the plaza in light of the Tenth Circuit's decision in *Summum v. City of Odgen*, 297 F.3d 995 (10th Cir. 2002). The Matthew Shepard Monument tendered by Phelps would state as follows:

> MATTHEW SHEPARD Entered Hell October 12, 1998, in Defiance of God's Warning 'thou

shalt not lie with mankind as with womankind; it is abomination.' Leviticus 18:22.

Following a City Council meeting, a letter was sent to Pastor Fred Phelps, advising him that the City Council had voted to remove the Ten Commandments monument from City Park, and to deny his request to place his monument in the park, or on any other city – owned property. The Westboro Baptist Church requested reconsideration of the council vote, stating that it was their goal to avoid litigation in the matter.

On November 14, 2003, the Ten Commandments monument was removed by the City on a temporary basis from City Park, pending approval of preliminary plans by the City Council to build a Historical Monument Plaza which would include the Ten Commandments monument. On June 1, 2004, Pastor Phelps sent a letter noting the city's plan to create the Historical Monument Plaza, and claiming that he would then have the right to install his Matthew Shepard Monument in the plaza.

In March, 2005, the City Council decided to await the decision in *Van Orden* before proceeding further. Following the Supreme Court's decision in *Van Orden*, the Casper City Council elected to construct the Historical Monument Plaza, which consists of stone monuments depicting the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Preamble to the United States Constitution, the Bill of Rights, and the Ten Commandments, all historic

documents which provided the foundation of our law, along with plaques describing the historical significance of these documents.

On the very day Casper's Historical Monument Plaza was dedicated, the city received a letter from Pastor Fred Phelps stating that his church had the right to place the Matthew Shepard Monument with the other monuments in this display. The City informed Pastor Fred Phelps that it was denying his request because the monument reflected his personal religious beliefs regarding Matthew Shepard, and it lacked any historical significance or connection to the founding of our Country that would qualify it for placement in Casper's Historical Monument Plaza. The city also informed Pastor Phelps that in its opinion it could not place his Matthew Shepard Monument on city property without violating the Establishment Clause of the First Amendment given the strictly religious character of the monument.[4]

From the above, it is clear that the City of Casper is faced with "lose-lose" dilemma as a result of the Tenth Circuit's perplexing *Summum* decisions. Even

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[4] The City of Casper believes it should not be forced to install the Matthew Shepard Monument as required by the *Summum* decisions simply because it accepted and chose to display other monuments on its Historical Monument Plaza. That monument has *no* historical significance by virtue of any connection to the founding of our nation; it is *strictly* religious in character and expresses a private religious opinion of a pastor and a church that has no meaningful relationship with the City of Casper.

as the city endeavors to follow this Court's decision in *Van Orden*, it confronts the prospect of litigation under the *Summum* decisions for refusing to put a private religious monument in its public plaza. And even if the City did accept the loathsome monument in an effort to comply with the decision below, it would be forced to run the risk that it would be found to have violated the Establishment Clause because it "endorsed" the religious views of Pastor Phelps by placing his monument in the plaza.

The panel decision embraces the dilemma the City of Casper has wrestled with for five years now, regarding it as a necessary result of this Court's precedent, without a word about the burden such litigation places on governmental bodies and ultimately taxpayers. *See Summum*, 483 F.3d at 1048 n. 2 (noting the "Establishment Clause prohibits governmental endorsement of religion, which can occur in the absence of direct governmental speech."); *see also Summum*, 499 F.3d at 1180–82 (noting that government "endorsement" or "sponsoring" of speech may be state action that violates the Establishment Clause even if the action in question is not properly characterized as government speech). For the reasons given above, the amici believe that the Tenth Circuit's reading of precedent is plainly mistaken because none of this Court's decisions require a finding that the government's acceptance and display of donated works displayed by public officials creates a public forum. More fundamentally, the City of Casper respectfully submits that the "lose-lose" litigation

dilemma it has wrestled with for five years as a result of the Tenth Circuit's *Summum* decisions conclusively removes any doubt that the decision below is fundamentally flawed and must be reversed.

CONCLUSION

The decision below creates a public forum for *permanent* speech by *private* citizens based on nothing more than the *government's* display of works donated by private citizens on public property. That result is an unwarranted and undesirable extension of this Supreme Court's decisions which have always required clear indicia of an intent to create a forum. The realistic approach recommended by this Court's precedent yields the commonsense conclusion that when public officials decide to accept and display works donated by private parties, the resulting display is properly characterized as government speech. The amici also respectfully submit that nothing in this Court's decisions forces government officials who decide to display such works to yield control of public property to every man who wishes to place a piece or make every man an iconoclast under pain of endless litigation. For these reasons, the amici respectfully request that this Supreme Court reverse the decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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(14)

No. 07-665

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IN THE
SUPREME COURT OF THE UNITED STATES

PLEASANT GROVE CITY, JIM DANKLEF, MARK ATWOOD, CINDY BOYD, MIKE DANIELS, DAROLD McDADE, JEFF WILSON, CAROL HARMER, G. KEITH CORRY, and FRANK MILLS,

Petitioners,

-against-

SUMMUM, a corporate sole and church,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

This year marks the 150th anniversary of the great plan, by Frederick Law Olmsted and Calvert Vaux, to turn a tract of swampy, muddy, and rocky land into New York City's Central Park. The plan was named "Greensward," after the English term for a vast lawn dotted with shade trees. That vision not only became the first public park ever built in America, but also may well be one of the most significant works of American art ever created. Declared a National Historic Landmark in 1965, Central Park was also named New York City's first Scenic Landmark in 1974.[1]

While Central Park is the City's best-known park, the City contains approximately 29,000 acres of public parks -- valuable open spaces preserved for both passive and active recreation, as natural areas, and as designed historical landscapes. Situated within our parks are some 1,200 monuments, including commemorative tablets, historic markers, decorative fountains, memorial

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[1] Unless otherwise indicated, these facts are from the websites of the City's Parks Department, the City's Art Commission, and the Central Park Conservancy, a non-profit organization founded in 1980 that, under contract with the Parks Department, manages Central Park. http://www.nycgovparks.org/sub_things_to_do/attractions/public_art/art_guidelines/pa_donation_guidlines.html (last accessed June 10, 2008); http://nyc.gov/html/artcom/html/review/procedures.shtml (last accessed June 10, 2008); and http://www.centralparknyc.org/site/PageNavigator/aboutpark_history_ataglance (last accessed June 19, 2008).

flagstaffs, statuary, and architectural ornaments. Most of these have been acquired as gifts over the last 150 years.

The oldest sculpture still standing in a City park was dedicated in 1856, when Henry Kirke Brown's bronze equestrian statue of George Washington was unveiled in Union Square. Sponsored entirely by public contributions, it was the first piece of what would become a vast civic outdoor museum that would reflect the shifting interests and styles of the generations that followed.

Today, the sculpture collection in the City's parks constitutes the greatest outdoor public art museum in the United States. The collection is a veritable "Who's Who" of American art, and includes the work of nineteenth-century masters such as Augustus Saint-Gaudens, Daniel Chester French, and John Quincy Adams Ward, as well as contemporary pieces from Louise Nevelson, George Segal, Alice Aycock, and Robert Graham.

There are 52 fountains, monuments, and sculptures in Central Park alone, along with 36 bridges and arches, no two of which are alike. The "Angel of the Waters" fountain at Bethesda Terrace (A1) was the only sculpture included in the original plan and has become a defining feature of the park. Others commemorate "Alice in Wonderland" (A2), Teddy Roosevelt (A3), Alexander Hamilton, Shakespeare, the Pilgrims, Hans Christian Andersen, the Civil War, the sinking of the U.S.S. Maine, and the 1925 dog-sled race that brought an urgently needed supply of antitoxin to Nome, Alaska, during a diphtheria outbreak there.

Central Park hosts an authentic, 71-foot Egyptian Obelisk from c.1450 B.C. that was installed in 1881, a fortification built for the War of 1812, and a turn-of-the-century carousel that is considered a masterwork of folk art from renown artisans Sol Stein and Harry Goldstein. Dotted throughout the park are decorative tiles, exquisite carvings, whimsical gates and arches, and bridges made of cast iron, stone, and unmilled timber.

The 843 acres of Central Park also include 136 acres of woodlands, 250 acres of lawns, and seven different bodies of water. There are 58 miles of pedestrian paths, 4.5 miles of bridle paths, 6.5 miles of Park drives, and 9,000 benches. There are 21 playgrounds, six designated quiet zones, and more than 26,000 trees, including 1,700 American Elms. Over 275 species of migratory birds have been spotted in the park, which is a major stopping point on the Atlantic flyway.

Since 1967, when the City debuted its first major outdoor group exhibition of contemporary sculpture, entitled "Sculpture in Environment," the Parks Department has also hosted more than 1,000 temporary installations in the City. CITY OF NEW YORK PARKS & RECREATION, 40 YEARS OF PUBLIC ART IN NEW YORK CITY PARKS, at 3 (2007). In 2005, Central Park became the canvas for Christo and Jeanne-Claude's "The Gates," an installation of 7,503 metal "gates" that created a 23-mile passageway of thousands of sheets of undulating deep saffron fabric (A4). http://www.christojeanneclaude.net/tg.shtml (last accessed June 19, 2008).

Some 1,200 monuments, 300 of which are sculptures, grace the City's most prominent civic spaces as well as the many localities in all five boroughs. Ranging in size from commemorative tablets to triumphal arches, they honor people and events that helped shape our city, nation, and the international community. It is a cultural and aesthetic legacy that the City has, since at least 1873, applied formal rules and standards to preserve.

With a limited number of available sites, subject to a variety of competing uses, not every proposed project is or can be approved. The City takes into account many factors when it considers the acceptance of a new permanent work of art. The process is two-fold and involves extensive review by both the Department of Parks and the City's Art Commission, a non-partisan design review board established in 1898.

The original park board accepted only five of 25 statues offered to the City. ROY ROSENZWEIG AND ELIZABETH BLACKMAR, THE PARK AND THE PEOPLE, A HISTORY OF CENTRAL PARK, at 332 (1992)("ROSENZWIIG AND BLACKMAR"). Ten more were added in the 1880s, and by the turn of the century, the park had 25 permanent pieces. *Id.* The park's growing statuary collection reflected the City's growing heterogeneity. More than half of the 15 statues of individuals accepted for placement in the park in the 19th century were financed and promoted by ethnic organizations. *Id.*, at 328-329.

In connection with the country's centennial anniversary in 1876, Gordon Webster Brunham proposed to give the City a massive, 34-foot-high

monument atop a 30-foot pedestal to honor Daniel Webster, the esteemed Massachusetts Senator. Olmsted and Vaux, however, opposed the proposed site -- an oval bed at the south end of the Central Park Mall -- as inappropriate to the size and scale of the monument, and as a "direct repudiation of the primary motive of the general design." FREDERICK LAW OLMSTED, SR., 40 YEARS OF LANDSCAPE ARCHITECTURE: CENTRAL PARK, at 495 (1973)("OLMSTED"). The men prevailed, and the monument was instead placed at the junction of West Drive and 72d Street. SARA CEDAR MILLER, CENTRAL PARK, AN AMERICAN MASTERPIECE, at 196-197 (2003)("MILLER").

As a result of that controversy, however, New York adopted its first set of rules governing the acceptance of artwork for permanent placement in the City's parks. Those rules, presented in a Committee Report dated April 25, 1873, to the City's Department of Public Parks, were drafted by Calvert Vaux and others. OLMSTED, at 488-493. They established a framework that is, in large measure, still in place today.

Even back then, any proposed gift of art had to be viewed either in its finished condition or as a model before acceptance. A judgment as to its merits "as a work of art" was sought from the respective presidents of the American Academy of Design, the American Museum of Art, and the American Institute of Architects. Olmsted urged that statues not "dominate a landscape or . . . divide the view over an expanse, lawn, or glade." OLMSTED, at 492-493.

The City soon promulgated those rules in the New York City Charter, which, in 1897 incorporated the five boroughs into greater New York and established the Art Commission of the City of New York as the City's design review agency. For the first time, decisions regarding the placement of art on public property would be made by representatives of the art world. ROSENZWEIG AND BLACKMAR, at 332.

Today, works of art are still assessed as they relate to the proposed site, the compatibility of the piece with the landscape, its impact on the park and its use, aesthetic merit, as well as safety and maintenance issues.

The Art Commission reviews all permanent works of art, architecture and landscape architecture proposed for City-owned property. This includes the design, installation and conservation of artwork, whether on long-term loan (more than one year) or in connection with a gift or acquisition. *See generally* N.Y.C. Charter section 851 *et. seq.* Each year, the Commission reviews approximately 300 proposals.

The Commission is composed of eleven members, who serve *pro bono*, and includes an architect, landscape architect, painter and sculptor, as well as representatives of the Brooklyn Museum, the Metropolitan Museum of Art and the New York Public Library. The Commission also acts as caretaker and curator of the City's public art collection and maintains an extensive archive documenting the history of New York City's collection.

Under the New York City Charter, the City agency with jurisdiction over the property for which the project is proposed must make the formal submission to the Art Commission. N.Y.C. Charter §854(d). For example, if an artist proposed to install a work of art in a City park, the application to the Art Commission must come from the Department of Parks & Recreation. If a project requires review by the Landmarks Preservation Commission, a written report from Landmarks must accompany the Art Commission submission.

Works of art are submitted for conceptual review early in the process when designs are at the schematic level. All works of art at the conceptual stage are required to be reviewed at an Art Commission committee meeting prior to submission to a public hearing. Preliminary review occurs once the design has been developed, and approval at this stage means that a work of art can be fabricated and installed. Final approval is given after a work of art has been installed.

Gifts of existing works of art must also be approved by the City agency on whose property the work of art will be sited and submitted by that agency for review by the Art Commission. There is no guarantee that a work of art will be approved by either the agency or the Art Commission, so artists are discouraged from fabricating a work of art with the expectation that approval of existing works of art is a certainty.

Gifts of works of art are not accepted unless there are appropriate funds committed by the donor for ongoing maintenance.

As the foregoing demonstrates, the City acts as a traditional curator of its public art collection in its parks, and all proposed additions to it. Thus, pursuant to Supreme Court Rule 37.4, the City of New York submits this brief in support of the petitioners in this case in order to explain to the Court how the City, when it accepts works of art for display in its parks, engages in a classic form of government speech, and why that traditional and profoundly important public benefit could be threatened should the Tenth Circuit's decision be affirmed.

SUMMARY OF THE ARGUMENT

This brief *amicus curiae* will show that when government accepts a donated work of art for public display in a public park, it engages in government speech and functions as a curator for the public good. The court of appeals therefore erred in applying a traditional First Amendment forum analysis in resolving this issue.

ARGUMENT

WHEN GOVERNMENT EXERCISES DISCRETION TO ACCEPT A DONATION OF A STATUE OR MONUMENT FOR DISPLAY ON PUBLIC PROPERTY, IT ACTS AS A CURATOR AND EXPRESSES EDITORIAL CONTROL, AND THE RESULTING DISPLAY OF PUBLIC ART IS GOVERNMENT SPEECH THAT DOES NOT IMPLICATE THE DONOR'S FIRST AMENDMENT RIGHTS.

A. The rigid application by the court of appeals of the public forum doctrine ignored the way in which monuments in public parks are selected and displayed, and as a result, the court applied the wrong legal analysis here.

It is undeniably true that streets and public parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), *citing Hague v. C.I.O.*, 307 U.S. 496, 515-516 (1939). Thus, a person "who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

The inquiry, however, does not end there. While there is a presumption that certain public property is a traditional public forum, subject to the public forum doctrine, that presumption is a rebuttable one. *United States v. Kokinda*, 497 U.S. 720, 728-729 (1990)("the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum"). Rather than apply the public forum doctrine in a rigid fashion, a court must analyze the parties' competing interests, informed by such factors as the property's physical characteristics, "the objective ways in which it is used, and the City's intent in constructing and opening it to the public." *Hotel Emples. & Rest. Emples. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 546-547 (2d Cir. 2002)("we examine the forum's physical characteristics and the context of the property's use, including its location and purpose. Also relevant is the government's intent in constructing the space and its need for controlling expressive activity on the property, as evidenced by its policies or regulations"). *See also International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680-681 (1992)(this Court describing "the tradition of airport activity" and its historical unavailability for speech activity to determine "there can be no argument that society's time-tested judgment, expressed through acquiescence in a continuing practice" resolved the issue as to the nature of the forum); *Kaplan v. Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989)(even where park "is indisputably a traditional public forum," city had still not created a forum "open to the unattended, solitary display of religious symbols" and there was therefore not "an

absolute constitutional right to engage in symbolic expressive conduct").

Thus, a public forum is not created merely because "members of the public are permitted freely to visit a place owned or operated by the Government." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S., at 680. Indeed, "forum analysis is not completed merely by identifying the government property at issue." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). Rather, in defining the forum, this Court has "focused on the access sought by the speaker." *Id.* Thus, "[w]hen speakers seek general access to public property, the forum encompasses that property." *Id.* But where "limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." *Id.*

Indeed, "the location of property also has bearing because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S., at 680-681 ("the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor can we say that these particular terminals, or airport terminals generally, have been intentionally opened by their operators to such activity; the frequent and continuing litigation evidencing the operators' objections belies any such claim. In short, there can be no argument that society's time-tested judgment, expressed through acquiescence

in a continuing practice, has resolved the issue in petitioners' favor").

Thus, the threshold error here was the rigid application by the court of appeals of the public forum doctrine simply because a public park is involved. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1052 (10th Cir. 2007). As explained below, that initial error sent the court down an analytical path that was wholly inapplicable to the circumstances presented here.

B. When government accepts a monument for display in a public park, it acts as a curator in expressing government speech, and that does not implicate private speech or a donor's First Amendment rights.

"Government is not restrained by the First Amendment from controlling its own expression." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139. n.7 (1973)(Stewart, J., concurring); *Serra v. United States General Services Admin.*, 847 F.2d 1045, 1048 (2d Cir. 1988). Indeed, "when the State is the speaker, it may make content-based choices." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). Thus, because courts treat private speech and government speech very differently, the determination of who, precisely, is speaking, is a critical if not dispositive one.

That is because "the First Amendment does not preclude the government from exercising editorial control over its own medium of expression." *Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033, 1044 (5th Cir.

1982) (*en banc*), *cert. denied*, 460 U.S. 1023 (1983). Government "may advance or restrict its own speech in a manner that would clearly be forbidden were it regulating the speech of a private citizen." *Serra v. GSA*, 847 F.2d, at 1049. *See also Rust v. Sullivan*, 500 U.S. 173, 193 (1991)("Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other"); *KKK v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1094 (8th Cir.), *cert. denied*, 531 U.S. 814 (2000)(public broadcaster that airs underwriting acknowledgements "exercises control not only over the decision to accept or reject the donations, but also over the form and content of the announcements themselves" and therefore engages in government speech).

When Pleasant Grove accepted the donated monument at issue now, just as when New York City has accepted sculpture and other works of art for public display, it engaged in government speech. *County of Allegheny v. ACLU*, 492 U.S. 573, 598 (1989)(this Court finding that, notwithstanding express disclaimer, display at county courthouse of a privately donated creche was "the county's creche display" that "has the effect of endorsing a patently Christian message"); *Serra v. GSA*, 847 F.2d, at 1045; *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 (8th Cir. 2005)(analyzing display of donated monument as government speech);

People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005)("The curator of a state-owned museum, for example, may decide to display only busts of Union Army generals of the Civil War, or the curator may decide to exhibit only busts of Confederate generals. The First Amendment has nothing to do with such choices"). *Cf. Freedom from Religion Found., Inc. v. City of Marshfield,* 203 F.3d 487, 491 (7th Cir. 2000)("we recognize the effect of formal transfer of legal title to property as a transfer of imputed expression from a public seller onto a private buyer").

Whenever government is "in the business of speech," such as when it is operating a museum, "the exercise of editorial judgment is inescapable." *Chicago Acorn, SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 701 (7th Cir. 1998); *PETA v. Gittens*, 414 F.3d, at 28-29 ("the authorities in charge of a city park must make content-neutral and viewpoint-neutral decisions when passing on applications for demonstrations in the park. . . . But those First Amendment constraints do not apply when the same authorities engage in government speech by installing sculptures in the park. If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee").

Thus, content-based considerations that arise, for example, in the context of the grant-making process, do not violate the First Amendment but are, instead, "a consequence of the nature of arts funding," even where government "must deny the majority of the grant applications

that it receives, including many that propose 'artistically excellent' projects." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998).

That is because with arts funding, the Government does not "indiscriminately 'encourage a diversity of views from private speakers,' but rather, makes "aesthetic judgments," and that "inherently content-based 'excellence' threshold . . . sets it apart from" the subsidy issues that typically arise in First Amendment forum analysis cases. *Nat'l Endowment for the Arts v. Finley*, 524 U.S., at 586. "As a speaker, and as a patron of the arts, the government is free to communicate some viewpoints while disfavoring others, even if it is engaging . . . in 'utter arbitrariness' in choosing which side to defend and which side to renounce. The First Amendment's Free Speech Clause does not apply to the government as communicator." *PETA v. Gittens*, 414 F.3d, at 30-31.

Thus, the content-based decisions made here are wholly within Pleasant Grove's prerogative and discretion as government speech, and are not subject to the strict scrutiny incorrectly applied by the court of appeals. 483 F.3d, at 1052-1053.

C. The court of appeals further erred by presuming that once any type of private speech is permitted in a public park, government is required to permit all kinds of private speech on an equal basis.

The "guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however

and wherever they please." *Greer v. Spock*, 424 U.S. 828, 836 (1976). "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* Government "need not permit all forms of speech on property that it owns and controls." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S., at 678.

Indeed, "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978)("We have long recognized that each medium of expression presents special First Amendment problems"); *Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 672-673 (1998)("the public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting"); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S., at 801 (defining "forum" as nonpublic Combined Federal Campaign, an annual fundraising drive, rather than more general federal workplace, a traditional public forum, because "respondents seek access to a particular means of communication").

Government also has a "substantial interest" in maintaining its parks "in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984). It has the discretion to deny a use that would be "totally inimical" to these purposes. *Id. See also Ward v.*

Rock against Racism, 491 U.S. 781, 797 (1989)("The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation").

Thus, courts "have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved." *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir.), *cert. denied*, 546 U.S. 929 (2005), *citing Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994)("no person has a constitutional right to erect or maintain a structure on the public way") and *Lubavitch Chabad House, Inc. v. Chicago*, 917 F.2d 341, 347 (7th Cir. 1990)("We are not cognizant of . . . any private constitutional right to erect a structure on public property").

Consequently, the state may regulate the display and location of public art based on its aesthetic qualities and suitability for the viewing public without running afoul of the First Amendment. *Serra v. GSA*, 847 F.2d, at 1048; *Piarowski v. Illinois Community College*, 759 F.2d 625, 630-23 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985).

Therefore, the court of appeals also erred when it found that "the particular means of communication (i.e. the display of a monument)" is relevant only to the extent of "defining the forum." 483 F.3d, at 1051. In doing so, the court of appeals failed to heed this Court's admonition that each medium of expression presents special First

Amendment problems and that all media cannot and should not be analyzed in an identical fashion.

D. The court of appeals has applied an analytical standard that impermissibly infringes on government speech, erodes government's incentive to display art in its parks, and endangers a richly unique cultural legacy of publicly accessible art.

Central Park has been described as the "living embodiment of nineteenth-century American landscape paintings, particularly those of the Hudson River, or New York, School." MILLER, at 11. Whether it is a Greco-Roman mosaic with the single word "Imagine" at its center (a 1985 gift of the Italian government in honor of the late John Lennon)(A5), the Park's folk art carousel, or the whimsical sight of 7,503 identical saffron–colored gated flags winding along the park's passageways, each piece of art displayed on public property has been scrupulously vetted by the Parks Department and the Art Commission in a statutorily created mission to curate an artistic and historical legacy that actively engages those who live in, work in, and visit New York City.

In recently celebrating 40 years of temporary public art installations in New York City parks -- what it called "The Outdoor Gallery" -- the City's Parks Department wrote that, "in a city of virtually limitless visual competition, the display of public art holds the power to surprise, stir debate, and cause the occasional scandal. And whether we stop to stare or accept them as part of our daily rounds, these public artistic expressions encourage us to rethink our physical and cultural surroundings,

and our place within this complex landscape." 40 YEARS OF PUBLIC ART IN NEW YORK CITY PARKS, at 30. What began in the 1800s with commemorative public statuary has become a sustained expression of the City's support of public art for art's sake.

And that is precisely why "we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all." *Ark. Educ. TV Comm'n v. Forbes*, 523 U.S., at 679. Not everyone will agree with the choices a city makes when it selects art for display in its public parks -- and maybe that is even the point -- but compelling a city to display art it does not want and deems contextually inappropriate infringes on that city's right of self expression. That is what the court of appeals has done here, and why its decision should be reversed.

CONCLUSION

II. THIS TENTH CIRCUIT'S JUDGMENT SHOULD BE REVERSED.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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(15)

No. 07-665

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In The
Supreme Court of the United States

PLEASANT GROVE CITY, JIM DANKLEF, MARK ATWOOD, CINDY BOYD, MIKE DANIELS, DAROLD McDADE, JEFF WILSON, CAROL HARMER, G. KEITH CORRY, and FRANK MILLS,

Petitioners,

v.

SUMMUM, a corporate sole and church,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, THIRTEEN OTHER STATES AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor?

2. Did the Tenth Circuit err by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties?

3. Did the Tenth Circuit err by ruling that the city must immediately erect and display Summum's "Seven Aphorisms" monument in the city's park?

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INTEREST OF AMICI

The States' interest is clear—preserving the sovereign authority of the States and their political subdivisions to engage in *government* speech. If it is inevitable that government will "adopt and pursue programs" that "are contrary to the profound beliefs and sincere convictions of some of its citizens," it is equally "inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Board of Regents of Univ. of Wisconsin Sys. v. Southworth,* 529 U.S. 217, 229 (2000). When the government speaks, "different principles" control. *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 834 (1995). Government speech takes many forms including advocacy of its own policies, *Rust v. Sullivan,* 500 U.S. 173, 194 (1991), determinations of excellence, *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998), and a public library's "traditional role in identifying suitable and worthwhile material," *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 208 (2003).

Although most government speech will involve the expenditure of public funds, there are instances when government speaks by accepting a donation of personal, real, or intellectual property from private interests and then using that property to perpetuate government's message. The use of property for government expression is constitutionally indistinguishable from the use of public funds

for government expression. If government can spend money to purchase newspaper and radio advertisements saying "immunize your child," government can accept a donation of a privately financed billboard that says, "immunize your child." Moreover, having advocated the message of childhood immunization, government can refuse the donation of a billboard that says, "immunization is a government conspiracy."

SUMMARY OF ARGUMENT

The States' argument is simple and straightforward. First, this Court should adopt a bright-line rule—when government accepts a donation of property, any resulting speech is government speech. If government wishes to accept a donation of property and disavow the resulting expression, it may do so in a clear and unambiguous manner.

Second, the lower court's alternative that when government accepts a donation of property, any resulting speech is private speech—has sweeping implications. Initially, the decision below undermines the States' ability to engage in government speech and does not promote private speech. Moreover, the alternative rule has implications far beyond the public parks. Even if this Court does not accept the States' proposed bright-line rule, it should reject the Tenth Circuit's result.

ARGUMENT

I. THIS COURT SHOULD ADOPT A BRIGHT-LINE RULE—WHEN GOVERNMENT ACCEPTS A DONATION OF PROPERTY, ANY RESULTING SPEECH IS GOVERNMENT SPEECH.

There is a constitutional distinction between private speech that utilizes government resources and government speech. *Finley*, 524 U.S. at 586. If government makes its property or funds available for private expression, the First Amendment prohibits viewpoint discrimination. *See Rosenberger,* 515 U.S. at 837 (public funds for student groups); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 394 (1993) (use of a publicly owned auditorium).[1] In contrast, the expenditure of public funds for government speech generally does not implicate the First Amendment. *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 559 (2005). "Simply because the government opens its mouth to speak does not give every outside . . . group a First Amendment right to play ventriloquist." *Downs v. Los Angeles Unified Sch. Dist.,* 228 F.3d 1003, 1013 (9th Cir. 2000). To suggest otherwise "would render numerous Government programs constitutionally suspect." *Rust,* 500 U.S. at 194. "Consequently, the Government may advance or restrict its own speech

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[1] *Cf. Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148 n.1 (1946) (second-class mailing privileges available to all newspapers and other periodicals).

in a manner that would clearly be forbidden were it regulating the speech of a private citizen."[2] *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1048 (2nd Cir. 1988).

This Court should adopt a bright-line rule—when government accepts a donation of real, personal, or intellectual property, any resulting speech is government speech. *See ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 774, 778 (8th Cir. 2005) (en banc) (implicitly assuming that a city's acceptance of a privately donated monument in public park resulted in government speech). In addition to providing clear guidance and certainty for governments at all levels, such a result is consistent with the jurisprudence of most Circuits that have addressed the issue.

When property is transferred from a private party to the government, "the effect of formal transfer of legal title to property [is] a transfer of imputed expression." *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). If a work of art "is entirely owned by the Government and is displayed on Government property," "the speaker is the . . . Government." *Serra*, 847 F.2d at 1049.

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[2] *See also Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (State may express official view of state history, but may not force individuals to do so); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 566 (1973) (Act forbidding federal employees from engaging in political activity does not violate First Amendment).

Similarly, a religious display "owned and displayed by the city government on city government property" is "government speech." *ACLU of New Jersey v. Schundler,* 104 F.3d 1435, 1444 (3rd Cir. 1997). "There is no private constitutional right to erect a structure on public property." *Graff v. City of Chicago,* 9 F.3d 1309, 1314 (7th Cir. 1993) (en banc). "If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures." *Lubavitch Chabad House, Inc. v. City of Chicago,* 917 F.2d 341, 347 (7th Cir. 1990). "Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved." *Tucker v. City of Fairfield,* 398 F.3d 457, 462 (6th Cir. 2005). "If the authorities place a statue of Ulysses S. Grant in the park, the First Amendment does not require them also to install a statue of Robert E. Lee." *PETA v. Gittens,* 414 F.3d 23, 29 (D.C. Cir. 2005). In sum, when government chooses to accept some donations, but to reject others, it is engaging in government speech. *Id.* at 28-29.

To be sure, there may be instances where government wishes to accept the donation of private property, but does not wish to engage in government speech or desires to create a limited public forum. For example, as part of the construction of a walkway or a building, government may wish to invite the public to "donate" bricks or tiles that convey the speech of the donor rather than the government. In such a situation, government may clearly and

unambiguously state that it is allowing private individuals to speak and is not adopting the message conveyed by the donated property. However, in the absence of clear and unambiguous disavowal of the resulting expression, the acceptance of a donation of property should be regarded as government speech.[3]

II. THE LOWER COURT'S ALTERNATIVE RULE—GOVERNMENT'S ACCEPTANCE OF DONATED PROPERTY RESULTS IN PRIVATE SPEECH—HAS SWEEPING IMPLICATIONS

The lower court's alternative rule—government's acceptance of donated property results in private expression—has sweeping implications.[4] Thus, even if this Court does not accept the States' proposed bright-line rule, it should reject the Tenth Circuit's reasoning.

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[3] In some instances, government's acceptance of donated property and the resulting speech may raise Establishment Clause concerns. *See Van Orden v. Perry*, 545 U.S. 677, 681-82 (2005) (State's acceptance of monument inscribed with the Ten Commandments). However, in those instances, the issue is whether government's message violates the Constitution, not whether the message is that of the government or the private donor.

[4] Presumably, the same rationale would apply if the donor sold the property to the government for less than fair market value. Thus, the lower court's alternative rule cannot be avoided by selling the property for some nominal amount.

A. The Lower Court's Alternative Rule Undermines Government Speech and Does Not Promote Private Speech.

Adopting the lower court's alternative rule effectively abolishes a particular form of government speech—accepting a donation of property and then using that property to convey government's message. Although government may still pursue other modes of communication, closing one mode of communication makes government expression more difficult. Government speech is undermined.

Furthermore, while government speech is inhibited by the alternative rule, there is no reason to believe that private speech will be expanded. As a practical matter, government will respond to the decision by refusing to accept donations of property. Moreover, faced with a choice of allowing all monuments in public parks or allowing none, many—if not most—governments will opt for none. Thus, the long-term effect of the decision may well be to inhibit private speech. Surely, the Constitution does not require a result that inhibits government speech while simultaneously not promoting—and possibly undermining—private speech.

B. The Alternative Effectively Prohibits Government From Using Public Parks to Convey a Particular Message.

As a practical matter, the alternative rule forbids government from using public parks to convey a

particular message. Under the lower court's reasoning, if donated property is erected in a public park, that park is transformed into a public forum where other private parties may erect donated property with expressive attributes. George Washington must stand near Benedict Arnold. Union Generals must be accompanied by their Confederate counterparts. A Holocaust Memorial must be alongside a monument to the Ottoman Empire's Armenian Genocide or the British atrocities during the Boer War, or, for that matter, a monument to honor Adolf Hitler.

Moreover, nothing in the lower court's opinion limits its rationale to public parks. Its logic extends to any governmental decision that involves the acceptance of property where some form of expression results. Most obviously, the decision applies to government's decisions regarding the contents and décor of government buildings. Since Virginia's Pocahontas State Office Building[5] contains a privately funded "Wall of Honor" commemorating those Virginians who have died in the War on Terror, should a protest group provide it, the building must also include a "Wall of Shame" protesting the War or celebrating the supposed virtues of the Terrorists.[6] Although South Dakota's Capitol Rotunda contains

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[5] Virginia names its State Office Buildings after prominent Virginians, including Jefferson, Madison, and Monroe.

[6] For a description of the "Wall of Honor," see http://www.vaag.com/PRESS_RELEASES/NewsArchive/052407_Wall.html.

privately donated sculptures of Wisdom, Vision, Courage, and Integrity, the lower court would mandate inclusion of other sculptures honoring Folly, Stupidity, Cowardice, and Dishonesty.[7]

Less obviously, the mandate extends to all decisions where government accepts property and some sort of expression results. Thus, if a public museum accepts a donation of a painting, it must accept all donations of paintings—even if it regards a painting as inferior art, distasteful, or simply inappropriate for the museum's overall purpose. Similarly, if a public university library accepts a donation of a book, it must accept all donations of books. *Cf. Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871-72 (1982) (libraries have broad discretion in determining what books to add to their collections). Conceivably, acceptance of a private party donation of laboratory equipment, computers, or curricular materials means that government may never refuse a donation. In time, government will be overwhelmed with mediocre art, unwanted books, and useless equipment. The only way for government to avoid becoming overwhelmed by useless donations is to refuse all donations of art and books.

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[7] For information and images of the sculptures, see http://www.state.sd.us/state/capitol/capitol/tour/bronze.htm.

CONCLUSION

For the reasons stated above, in the Brief of the Petitioners, and in the other amici briefs supporting the Petitioners, the judgment of the United States Court of Appeals for the Tenth Circuit should be **REVERSED**.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioners,

v.

SUMMUM,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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INTEREST OF AMICI CURIAE

Faith and Action, Institute in Basic Life Principles and International Reapers Foundation join together once again to advocate that the "Philosophy of Government" of the United States of America, as established in the Declaration of Independence, is the legal foundation and fabric of the Constitution and mandates its interpretation.*

SUMMARY[1]

Amici answers the third question presented in the Petition for Writ of Certiorari: "Did the Tenth Circuit err by ruling that the city must immediately erect and display Summum's proposed monument in the city's park" is argued here by Amici and agrees with Petitioner that the Tenth Circuit did commit error and should be reversed.

Amici argues that the law and historical precedents demonstrate conclusively that the Founding Fathers

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* No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[1] The author of this brief is indebted to the thinking of several author's including the late Robert C. Cannada in his brilliant, logical, and convincing advocacy based upon extensive research that the Declaration of Independence contains "America's Rule of Law."

emphatically intended that the Declaration of Independence is the foundation of this nation on which its government would be constructed. The Declaration is the very heart and spirit of the Constitution which contains the "political process" which was to be utilized in protecting the rights established in the Declaration which expressed in no uncertain terms America's Philosophy of Government, otherwise known as "America's Rule of Law." That "rule of law" was not man-made, but was predicated on God-given transcendent principles of moral law.

The failure to recognize and apply that rule of law has resulted in legal chaos and escalating moral decline in this nation, the evidence of which is overwhelming.

INTRODUCTION

The courts continued to be inundated with cases dealing with moral issues. After over sixty years of wrestling with moral issues which have generated untold volumes of rhetoric and decisions, the courts have yet to provide a guiding beacon that stabilizes that legal environment. As a matter of fact, judicial unity on this subject is further from solution that when the problem was created in 1947 by departure from the "rule of law" contained in The Declaration. The result is a lack of coherence in our courts and society with the seeds of national destruction having been planted.

The Declaration of Independence was written at a time of peril for the colonies who were seeking a route to freedom.

It was a declaration of reality, not political hype. It was a declaration based on a confidence in a Supreme Judge, that the 56 signers pledged their lives, fortunes, and sacred honor. History discloses that five were captured as traitors and tortured before they died; nine others fought and died during the Revolutionary war. Many of the others, if not most, lost their health, wealth, their homes and often their families.

Unless the Declaration is referenced, our government has no stated purpose or objective. It is the principles of the Declaration that give a purpose or objective to our government. Accordingly, if the principles of the Declaration are ignored, then "any road will get us there because we do not know where we are going." Amendments to the Constitution simply enumerate (not grant) some, but not all, of these "rights." The Declaration finds practical expression in the Constitution. Neither can be fully understood without the other.

The courts are to utilize the political process of the government, which is set forth in the Constitution, to fulfill its requirement to secure the inalienable rights with which this nation's inhabitants have been endowed by their Creator.

For a judge to interpret the Constitution without recognizing that it is to be interpreted in the light of the foundational Philosophy of Government set forth in the Declaration, would seem to constitute a violation of his or her oath to support the Constitution of the United States of America. It is contended this is not optional but comports with the oath to support the Constitution.

It is contended the Constitution can no more be separated from its foundation, the Declaration, and survive than a building can be separated from its foundation and survive.

The moral law contained in the Declaration establishes what we ought to do. Without a foundational transcendent moral law, the "political process" can be manipulated to process a "relative moral law" which appeases any sort of desired behavior. If "law" is the product of the political process, however, then all is relative. There is no right or wrong; indeed, there is no law.

A classic illustration of a government under that political indictment, and adhered to by a captured judicial system, is emphatically illustrated in the Nuremberg trials at the end of World War II.

The escape hatch used to justify the "political process" rather than the foundational moral rule of law established in the Declaration, is to deliberately classify "moral law" as "religion" and apply the judicially manufactured term, "separation of church and state." Neither the people nor the government can be the source of moral laws or moral truths.

The terms "laws of nature and of nature's God" state transcendent moral "laws of nature and of nature's God" state "truths" which are "self-evident" that all men are "created equal," and "endowed " by their Creator with certain "unalienable rights." "truths" which are "self-evident" that all men are "created equal," and "endowed " by their Creator with certain "unalienable rights."

THE TRANSCENDENT MORAL TRUTHS CONTAINED IN THE DECLARATION ESTABLISHED "AMERICA'S RULE OF LAW"

The Declaration emphatically adopts a "two tier" governmental structure.

(1) A foundation of transcendent moral truths called America's Rule of Law, or in other words its Philosophy of Government.

(2) The Constitution, the "political process" which organizes the powers of the government of the United States. The Constitution is required to be interpreted in accordance with the principles established in the Declaration, the founding organic document of the United States, and can not be repugnant to its principles. The alternative is the product of "man-made rights," with predictable destructive consequences.

The Declaration was written using carefully selected words that conveyed a precise factual meaning. The interpretation consequently could not be one of conjecture or private opinion.

The word "gentlemen," is an illustration. The term meant a man who had a coat of arms and was a landowner. He could thus be a liar, and still be a gentleman. In today's society, that word has been adulterated and describes merely an opinion of the speaker. That manner of thinking has been carried over into the judicial world. It is used in giving a word in the Declaration or Constitution an unintended meaning resulting in unpredictable legal consequences.

The words in the Declaration, for example "the Laws of Nature and of Nature's God...;" "these truths to be self-evident...;" "endowed by their Creator with certain unalienable Rights . . . ," "That to secure these rights, Governments are instituted among men, . . . ," had a precise factual meaning understood by every signer, and anyone who read the Declaration..

From Blackstone's *Commentaries on the Laws*:[2]

> Law, in it's most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate. rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the *LAWS OF NATURE AND OF NATIONS*. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.
>
> Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. This will of his Maker is called the *LAW OF NATURE*. For as God, when He created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free will to conduct

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[2] Introduced in 1766 was invoked as an authority in the writings of James Kent, James Wilson, Fisher Amos, Joseph Story, John Adams, Henry Lawrence, Thomas Jefferson, James Madison, James Otis, etc.

himself in all parts of life, He laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

This *LAW OF NATURE*, being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; . . . he has laid down only such laws as were founded in those relations of *justice*, that existed in the *nature of things* antecedent to any positive precept. These are *the eternal, immutable laws of good and evil* . . . he has . . . so inseparably interwoven the laws of eternal *Justice* with the *happiness of each individual, that the latter cannot be obtained but by observing the former* . . . the doctrines thus delivered we called the revealed or divine law, and are to be found only in the *Holy Scriptures* . . . upon these two foundations, the law of nature and the law of revelation, depend all of human laws; that is to say no human laws should be suffered to contradict these.

Locke employs the same definition:

The *Law of Nature* stands as an eternal rule to all men, legislate doors as well as others. The rules that they make for other men's

> actions must . . . the conformable to *the Law of Nature, i.e.* to the will of God.[3]

Richard Hooker , a favorite of Locke and many of the founding fathers, referenced the *law of nature* as coming from the Scripture which was filled with *Laws of Nature.*[4]

> Additional Recognition of the meaning of those terms:
>
> All [laws], however, may be arranged in two different classes. (1) Divine. (2) Human. . . . But it should always be remembered that this law, natural or revealed, made for man or for nations, flows from the same Divine source: it is the law of God. . . . Human law must rest its authority ultimately upon the authority of that law which is Divine.[5]
>
> [T]he law . . . dictated by God Himself is, of course, superior in obligation to any other. It is binding all over the globe, in all countries, and at all times. No human laws are of any

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[3] John Locke, *Two Treaties*, Book II, p. 285, Chapter XI, §135

[4] *The Works of That Learned and Judicious Divine, Mr. Richard Hooker* Vol. I pp, 148, 207, 230, 427.

[5] James Wilson, *The Works of the Honorable James Wilson*, Bird Wilson, Editor (Philadelphia: Lorenzo Press, 1804) Vol. 1, pp. 103-105, "Of the General Principles of Law and Obligation."

validity if contrary to this.[6] (Alexander Hamilton)

So whatever modern day opinions might seek to establish, it is inarguably conclusive that when the Declaration was signed on July 4, 1776, the terms utilized had precise meanings which are simply being ignored .

- Creator God: The transcendent and moral personal being who brought into existence the universe and who according to his own nature established in it a moral order.

- Form of Government: The structure of the government infused with "the political process" to be used in protecting the rights established in the founding document.

- Laws of Nature and Nature's God: The transcendent, universal, and unalterable moral code of the Creator God.

- Natural Law: The source of that transcendent moral law as used in the Declaration is the Creator God.

The term "Creator" found in Blackstone and used in the Declaration of Independence and the term *Law*

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[6] Alexander Hamilton, *The Papers of Alexander Hamilton*, Herald C.Syrett, editor (New York: Columbia University press, 1961) Vol. 1 p. 87, p. 87, Feb 23, 1875, quoting William Blackstone, Commentaries on the Law of England

of Nations found in the Constitution, Article I § 8 further supports importation of the terms directly into the Constitution.

John Jay, first Chief Justice of the Supreme Court, said ". . . Natural law was given by the Sovereign of the universe to all mankind."[7] Zephaniah Swift who wrote America's first law text agreed stating: "The . . . Supreme Deity. . . . [Gave] those general and immutable laws that will regulate their operation through the endless ages of eternity . . . are denominated the laws of nature."[8] Samuel Adams contributed: All men . . . are equally bound by the laws of nature, or to speak more properly, the laws of the Creator.[9] Noah Webster commented that the ". . . 'law of nature' is a rule of conduct . . . established by the Creator . . . denominated in Scripture . . ."[10]

James Wilson, a signer of the Constitution said: ". . . human law must rest its authority ultimately upon

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[7] John Jay, *The Life of John Jay.*, William J., Editor (New York: J& J. Harper, 1833), Vol. II, p. 385.

[8] Zephaniah Swift, A System of the Laws of the State of Connecticut (John Byrne, 1795), Vol. I, pp. 6-7.

[9] Samuel Adams, *The Writings of Samuel Adams*, Harry Cushing, Editor (New York: G.P. Putnam's Sons, 1908), Vol. IV, p. 356.

[10] Hamilton, *Papers*, Vol. I p. 87, February 23, 1775, quoting from Blackstone.

the authority of that law which is Divine."[11] Rufus King added his additional comment: ". . . Law established by the Creator, which has existed from the beginning. . . . [Is] binding upon mankind. . . . [This] is the law of God by which He makes his way known to man and is paramount to all human control."[12]

THE TERMS USED IN THE DECLARATION DID NOT REFER TO OR ESTABLISH A RELIGION

There is a fundamental difference between the nations' legal philosophy of government and religion. Philosophy of government involves principles, presuppositional truths, and perspectives on the nature and purpose of government.[13] It includes a view on the source of rights, the purpose of and restraints on government, the source of power of government, and the source of a standard of morality to be incorporated into its legal system.

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[11] James Wilson, *The Works of the Honorable James Wilson*, Bird Wilson, Editor (Philadelphia: Lorenzo Press, (1804), Vol. I, pp. 103-105, "*Of the General Principles of Law and Obligation.*"

[12] Rufus King, *The Life and Correspondence of Rufus King*, Charles R. King, Editor (New York: G.P. Putnam's Sons, 1900), Vol. VI, p. 276.

[13] "[Philosophy] when applied to any particular department of knowledge denotes the collection of general laws or principles under which all the subordinate phenomena or facts relating to that subject are comprehended." *American Dictionary of the English Language.* (Noah Webster, 1828)

Religion, on the other hand, is defined as the manner of discharging our duty to our Creator,[14] and is to be specifically distinguished from a philosophy of government.[15] Failure to make that distinction leads one down many dissonant trails. The following quotation is in accord with the principle of performing one's duty to the Creator, as opposed to recognition of God. "The term religion has reference to one's views of his relations to his Creator, and the obligation they impose of reverence for his being and character, and of obedience to his will." *Davis vs. Beason* 133 U.S. 333, 342 (1890).

THE DECLARATION AND ITS PRINCIPLES ARE LEGALLY RECOGNIZED AS PART OF THE CONSTITUTION AS ONE UNIT

The Declaration and its principles have been historically recognized as being a legal part of the Constitution and thus binding on Constitution's interpretation..

The original States endorsed the Declaration and every State since has been required to provide a government that is ". . . republican in form and in conformity with the Constitution of the United States

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[14] Madison quoting from the Virginia Constitution, Article I §16 (1776 and current).

[15] The Bible, which was used as a guide in drafting the founding documents, also defines religion as duty. " If any man among you seem to be religious, and bridalleth not his tongue, but deceiveth his own heart, this man's religion is vain. Pure religion and undefiled before God and the Father is this, to visit the fatherless and widows in their affliction, and to keep himself unspotted from the world. (James 1:26-27)

and the *principles of the Declaration of Independence* . . ." [See State of Hawaii, Pub. L. No. 86-3, 73 Stat. 4 (1959)] (Emphasis supplied)

To become a territory of the United States, its government must comply with the Northwest Ordinance—adopted July 13, 1787 by the United States in Congress assembled—Article Third, providing "religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[16] [17]

Former President John Quincy Adams at the Jubilee of the Constitution on April 30, 1839[18], the 50th anniversary of the inauguration of President Washington stated:[19]

> "This act [the Constitution] was the compliment to the Declaration of Independence; founded upon the same principles, carrying them out into practical

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[16] It is specifically to be noted that this was adopted the same week that Congress was completing the draft of the First Amendment. The ordinance was reenacted in 1789 at the time the Bill of Rights was sent to the states for approval.

[17] See *Meyer v. United States*, 272 US 52, 174-175 (1926)

[18] This address of course was some 50 years or so after the adoption of the Bill of Rights.

[19] *America's Rule of Law* by Robert C. Cannada; published, National Lawyers Association Foundation (2001).

> execution, and formulating with it, one entire system of government . . . the Declaration and Constitution are parts of one consistent whole, founded upon one and the same theory of government, then new, not as a theory, for it had been working itself into the mind of man for many ages, and been especially expounded in the writings of Locke, but had never been adopted by a great nation in practice."

November 19, 1863, President Lincoln in his Gettysburg Address officially recognized the Declaration of Independence as the beginning of this nation. Its Philosophy of Government was the reason for the bloody civil war because the government of the United States, which was now protecting the rights declared in the Declaration.

John Quincy Adams made this extraordinarily clear in a speech he delivered at the New York Historical Society on April 30, 1839:

> "The Declaration was America's charter . . . the act [Constitution] . . . forming with it one entire system of national government . . . All this is by the Laws of Nature and of Nature's God, which of course presuppose the existence of a God , the moral ruler of the universe in a rule of right and wrong, of just and unjust, binding upon men, preceding all institutions of human society and of government . . . now the virtue which had been infused into the Constitution of the United States, and was to give to it its vital existence,

> the stability and duration to which it was destined, was no other than the concretion of those abstract principles *which had been first proclaimed in the Declaration of Independence-namely, the self-evident truths of the natural and unalienable rights of man . . . always subordinate to . . . the Supreme Ruler of the universe . . . that was the platform upon which the Constitution of United States had been erected . . . consisted in its conformity to the principles proclaimed in the Declaration of Independence. . . .*" (Emphasis added)

Alexander Hamilton concurred saying the Constitution is nothing but the body and letter of the Declaration which is its thought and spirit.[20] He added that the law was dictated by God Himself and that no human law was of any validity contrary to God's law.[21]

In a turn-of-the-century case the court held: "The latter [Constitution] is but a body and the letter of which the former [Declaration of Independence] is the thought and the spirit, and it is always safe to read the letter of the Constitution in the Spirit of the Declaration of Independence." *Gulf, Colorado and Santa Fe Railroad Co. v. Ellis*, 165 U.S. 150, 160 (1897).

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[20] *The Federalist*, p. 275, Federalist # 49 by Alexander Hamilton.

[21] Alexander Hamilton, *The Papers of Alexander Hamilton*, Harold C. Syrett, Editor (New York: Columbus University Press, 1961), Vol. I , p. 87, February 23, 1775

This philosophy of government is reflected in numerous ways in the Constitution, both in content and theory. "We the People" declare that the power to create government comes from the "consent of the governed." The Preamble also states that one of the purposes of the Constitution is to "secure the blessings of liberty to ourselves and our posterity." This statement affirms the concept of unalienable rights, given by the Creator. Article VII acknowledges the existence of the Creator, and as previously noted, incorporates the philosophy of government which is embodied in the Declaration.

The philosophy of government that acknowledges the Creator God is also reflected in all Amendments. For example, the Fifth Amendment protects "Life, Liberty, and Property." This recognizes the importance of protecting unalienable Rights, and establishes that those Rights cannot be taken away unless appropriate legal steps are taken. This also affirms the truth that all people are created by God and, therefore, have great value. No one has the authority or right to take another person's life. This asserts the government's purpose to secure the unalienable right to life as stated in the Declaration of Independence. The 14th Amendment, ratified July 9, 1868, provides due process and equal protection and would be without meaning if there was not the philosophy of government that acknowledged the Creator. "All Men are created equal" is the bedrock foundation of due process and equal protection.

Article I, § 8 of the Federal Constitution is relevant to the pattern and states:

> "To define and punish piracies and felonies committed on the high seas, and offenses against the ***Law of Nations***."

Article VI of the Constitution provides in the third paragraph thereof:

> "The Senators and Representatives before mentioned and the members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by **Oath or Affirmation**, to support this Constitution; . . . ."

Article VII of the Constitution provides in the last paragraph thereof:

> "Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the ***Year of Our Lord*** one thousand seven hundred and Eighty-seven ***and of the Independence of the United States of America the Twelfth***. In Witness whereof, We have hereunto subscribed our Names, [George Washington-President and deputy from Virginia, etc]. (Emphasis supplied)

Article VII of the Constitution then legally engrafts the Declaration Of Independence into the Constitution

as effectively as though it had said, "attached hereto and made a part hereof," by the declaration ". . . by the unanimous consent of the States present the 17th day of September in the *year of our Lord* one thousand seven hundred and eighty seven, *and of the independence of the United States of America the twelfth.*

As a direct consequence, all the terms as defined above are fused into the Federal Constitution., and thus become the governing Law of this land.

Justice Douglas in *McGowan v. State of Maryland*, 366 U.S. 420, 81 S. Ct. 1218 (1961).] captured that historical fact in these words:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator or, which government must respect. The Declaration stated the now familiar theme: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.' ***And the body of the Constitution as well as the Bill of Rights enshrined those principles***. (Emphasis added)

President Truman, when questioned concerning the reason for America's greatness following the World Wars, said:

> The fundamental basis of this nation's laws was given to Moses on the Mount. The fundamental basis of our Bill of Rights comes from the teachings we get from Exodus and St. Matthew, from Isaiah and St. Paul. I don't think we emphasize that enough these days. If we don't have a proper fundamental moral background, *we will finally end up with a totalitarian government which does not believe in rights for anybody except the State!* (Emphasis supplied).[22]

Modern illustrations affirm our philosophy of government: Franklin Delano Roosevelt during a radio broadcast in 1935:[23]

> We cannot read the history of our rise and development as a nation, without reckoning with the place the Bible has occupied in shaping the advances of the Republic.

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[22] :http//www.zdraines.homestead.com/files/bookusa.htm (One Nation under God; part eight-*America at the Crossroads*, summary).

[23] The quotations of President Roosevelt and President Truman:http//www.zdraines.homestead.com/files/bookusa.htm (*One Nation under God; part eight-America at the Crossroads, summary)*

During World War II, Gideon's International printed multitudes of New Testaments that were given to our troops as they left for the service. The prologue of this Bible was written by President Roosevelt and was short and to the point as to why these Bibles were given out.

> As Commander-in-chief, I take pleasure in commending the reading of the Bible to all who serve in the armed forces of the United States. Throughout the centuries men of many faiths and diverse origins have found in the Sacred Book words of wisdom, counsel, and inspiration. It is a fountain of strength and now, as always, an aid in attaining the highest aspirations of the human soul."

Harry Truman's first address to Congress concluding words are stated; followed by his quote that America became great following two World Wars based on our legal system :

> At this moment I have in my heart a prayer. As I have assumed my heavy duties, I humbly pray to Almighty God in the words of King Solomon 'Give therefore Thy servant an understanding heart to judge Thy people that I may discern between good and bad; or who is able to judge this Thy so great a people?' I ask only to be a good and faithful servant of my Lord and my people.
>
> The fundamental basis of this nation's laws was given to Moses on the Mount. The fundamental basis of our Bill of Rights comes

> from the teachings we get from Exodus and St. Matthew, from Isaiah and St. Paul. I don't think we emphasize that enough these days. If we don't have a proper fundamental moral background, *we will finally end up with a totalitarian government which does not believe in rights for anybody except the State!* (Emphasis supplied)

John F. Kennedy in his inaugural address on January 20, 1961 said:[24]

> The rights of man come not from the generosity of the State but from the hand of God. The energy, the faith, the devotion which we bring to this endeavor will light our country and all who serve it, and the glow from that fire can truly light the world. And so, my fellow Americans, ask not what your country can do for you, ask what you can do for your country. Let us go forth to lead the land we love, asking His blessing and His help, but while here on Earth God's work will truly be our own.

Ronald Wilson Reagan was the 40th president of the United States. On October 4, 1982, upon the joint resolution of Congress, President Reagan declared 1983

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[24] The quotations of President Kennedy and President Reagan:http//www.zdraines.homestead.com/files/bookusa.htm (*One Nation under God; part eight-America at the Crossroads, summary)*

the "year of the Bible". This resolution, Public Law 97-280, stated:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the president is authorized and requested to designate 1983 as a nation 'Year of the Bible' in recognition of both the formative influence the Bible has been for our nation, and our national need to study and apply the teachings of the Holy Scriptures.

Further corroboration is a statement of Chief Justice of the United States Supreme Court, Earl Warren printed in *Time* magazine, February 15, 1954:

> I believe no one can read the history of our country without realizing that the Good Book and the Spirit of the Savior have from the beginning been our guiding genius. Whether we look to the first charter of Virginia or to the Charter of Massachusetts Bay, or to the fundamental orders of Connecticut, the same objective is present, a Christian land governed by Christian principles. I believe the entire Bill of Rights came into being because of the knowledge our forefather's had of the Bible and their belief in it. I like to believe we are living today in the Spirit of the Christian religion. I like also to believe that as long as we do so, no great harm can come to our country.

EVIDENCE OF THE APPLICATION OF THE MORAL TRUTHS IN THE DECLARATION AND MODERN-DAY FAILURE TO APPLY THOSE TRUTHS

Some early Supreme Court cases illustrate the recognition of an application of the moral law contained in the Declaration.

Here are some comparisons of court decisions on morals in the 1800's and modern-day jurisprudence. In 1985, Cassie Grove, a high school sophomore, had been required to read *A Learning Tree* for her English Literature class. She objected to being forced to read several portions. The court in *Grove vs. Mead School District,* 753 F. 2nd 1528 (9th Cir. 1985), *cert. denied,* 474 U.S. 826, ruled against her and found that students taking that class would be required to read the book containing much offensive language including the following:

> "Declaring Jesus Christ to be a 'poor white trash God,' or 'a long legged white son-of-a-b__h.'"

In *People vs. Ruggles,* 8 Johns 545 (Sup. Ct. NY. 1811) Ruggles had used the following language: "Jesus Christ was a bast__d, and his mother must be a whore." The court found Ruggles guilty and said:

> Such words . . . were an offense at common law . . . [I]t tends to corrupt the morals of the people, and to destroy good order. Such offenses . . . are treated as affecting the essential interests of civil society.

In *Cohen v. California*, 403 U.S. 15, 18, 20, 25 (1971) Cohen wore a jacket bearing the words "F___the Draft" in a corridor of the Los Angeles Courthouse. The California statute which prohibited the public use of such words was found unconstitutional as violating his freedom of expression guaranteed by the 1st and 14th Amendment. The court found this was not an obscenity case and although "the air may at times seem to be filled with verbal cacophony . . . in this sense it was not a sign of weakness but of strength."

In contrast, the Supreme Court in *People vs. Ruggles, supra.* (1811) stated:

> Nothing could be more offensive to the virtuous part of the community or more injurious to the tender morals of the young, then to declare such profanity lawful . . . and shall we form an exception in these particulars to the rest of the civilized world?

In the case of *Erznoznik vs. City of Jacksonville*, 422 U.S. 205, (1975) the city of Jacksonville was seeking to restrict adult movies shown in a public drive-in theater because the screen was facing a church and two public streets frequented by children. The Supreme Court said striking down the ordnance explaining that it could not ". . . be justified as an exercise of the [city] . . . for the protection of children."

In direct contrast, *Commonwealth v. Jesse Sharpless and Others*, 2 Surge. & R. 91, 103, 104 (Sup. Ct. Penn.1815) the court came to the exact opposite decision:

> The destruction of morality renders the power of the government invalid. . . . The corruption of the public mind, in general, and deep watching the manners of youth, in particular, by the mood and obscene pictures exhibited the view, must necessarily be attended with the most injurious consequences. . . . No man is permitted to corrupt the morals of the people.

It would take a library and decisions to catalog all of the discriminatory conduct against any communication which the Declaration Of Independence declares as "self-evident truths," moral rights which are established by the living God as disclosed in the declaration. Those would include refusal to let a teacher, Stephen J. Williams provide a handout containing the "Declaration of Independence" to his students and other absolutely contumacious violation of his rights to distribute handouts to students all of which were consistent with the moral truths provided for in the Declaration.(See, *Williams v. Patricia Vidmar, Principle of Stevens Creek School, et al.*; (Case No. C-04-4946 [filed November 22, 2004])

In addition, the historical record discloses that the Congress printed Bibles and distributed them, the Bible was used in schools for educational purposes, prayer and Bible study was permitted in the schools. Public displays

of the Ten Commandments and other exhibits such as Christmas decorations, crosses, Christmas trees, use of terms such as Thanksgiving, Christmas, Easter, and the list goes on as graphic illustration of the cultural heritage of this nation as contained in the Declaration.

EVIDENCE OF THE CONSEQUENCES OF ABORTING THE PHILOSOPHY OF GOVERNMENT IN THE DECLARATION

It does not require any diligent research to illustrate the consequences of the total violation of the transcendent moral truths established as the nations philosophy of government in the Declaration of Independence. One could trace the beginning of this escalating slide into the moral abyss from the case totally unsupported by precedent, *Everson v. Board of Education of Ewing TP.*, 301 U.S. 1 (1947).

A few statistics demonstrate the following commencing with the year 1963 until 1993: birthrates for unwed girls 15-19 years of age from 15 to 45[25]; violent crimes from approximately from .25 million to 1.9 million[26]; in the age group of 10-14 sexually transmitted diseases have gone from 14 to 70 per 100,000 total population in 1990 and then dropped back to 54 in 1993[27];

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[25] basic data from Department of Health and Human Services and statistical abstract of the United States

[26] Basic data from statistical abstract of the United States, and the Department of Commerce, Census Bureau

[27] Basic Data from the Center for Disease Control in Department Of Health And Human Services

SAT total scorers and dropped from 1980 two 910 in 1994[28]; family stability, that is single-parent households with a female head, no spouse present have risen from 5 million households in 1963 to 12 million in 1993-94.[29]

Getting into the 21st century, the moral scene is even more bizarre. In the headlines just a week or so ago, 15 teenage girls, "children" which our laws are designed to protect and morally educate, determined that they were going to get pregnant and all of them did. If this court could walk into probably 70 or 80% of the sex education courses in the high schools across this land, they would be shocked. It is nothing but sheer pornography. Case in point is the sex education program at Hononegah high school in Rockton, Illinois. The development of homosexual clubs within the high schools is creating a panacea of tragic consequences.

State of Colorado Senate Bill 08-200 "Concerning the Expansion of Prohibitions against Discrimination, and Making an Appropriation Therefor," Provided under Section 6.24-34-601 (1) and (2) Colorado Revised Statutes are amended to read:

> **24-34-601. Discrimination in places of public accommodation.**
>
> (1) As used in this part six, "place of public accommodation" means any place of business

[28] Basic Data from the College Entry Exam Board, New York.

[29] Basic data from statistical abstract of the United States, and the Department of Commerce, Census Bureau

engaged in any sales to the public and anyplace offering services, facilities, privileges, advantages, or accommodation to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facilities; a barbershop, bathhouse, swimming pool, baths, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of the person; a campsite or trailer camp; the dispensary, clinic, hospital, convalescent home, or other institution for the sick, alien, aged, or infirm; a mortuary, undertaking parter, or cemeteries; an educational institution; or any public building, park, Arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor. "Place of public accommodation" shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.

(2) It Is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny it to an individual or a group, because of disability, race, creed, color, sex, Sexual Orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or

accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail in a written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence in a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable blue because of disability, race, creed, color, sex, Sexual Orientation, marital status, national origin, or ancestry.

24-34-602. Penalty and Civil Liability.

(1) Any person who violates any of the provisions of section 24-34-601 by denying to any citizen, except for reasons applicable alike to all citizens of every disability, race, creed, color, sex, SEXUAL ORIENTATION, marital status, national origin, or ancestry, and regardless of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated or by aiding or inciting such denial, for every such offense, shall forfeit and pay a sum of not less than fifty dollars nor more than five hundred dollars to the person aggrieved thereby to be

recovered in any court of competent jurisdiction in the county were said to offense was committed.

(2) For each offense described in subsection (1) of this section, the person is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than ten dollars nor more than three hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

(3) omitted

24-34-701. Publishing of discriminative matter forbidden. (The text omitted)

2-4-401. The following definitions apply to every statute, unless the context otherwise requires:

(13.5) "SEXUAL ORIENTATION" MEANS A PERSON'S ORIENTATION TOWARD HETEROSEXUALITY, HOMOSEXUALITY, BISEXUALITY, OR TRANSGENDER STATUS OR ANOTHER PERSON'S PERCEPTION THEREOF.

The above act is incredible beyond description and is the product of decisions by courts of law in violation of the constitutional provisions contained in the Declaration Of Independence and demonstrate precariously a comparison of what was going on in Germany under the Nazi government.

CONCLUSION

The Declaration of Independence must be recognized as containing a law and moral truths not prescribed by man, but prescribed by the Creator God as set forth in the Declaration which was to be the foundation under which the "political process" contained in the Constitution was to be administered for the protection of those moral truths and the rights contained in the declaration. If as a court and a nation we cannot recognize the evidence of the tragic consequences of aborting that foundation, the future for our posterity is certainly not that which was planned by the Founding Fathers in the Declaration of Independence; rather we will inherit the prophetic pronouncements of the Founders.

As C. K. Chesterton said: "when God is no longer the foundational basis for government, then the government becomes God.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, et al.,
Petitioners,

v.

SUMMUM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE FOUNDATION FOR FREE EXPRESSION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICI[1]

The Foundation for Free Expression ("FFE"), as *amicus curiae*, respectfully submits that the decision of the Tenth Circuit panel should be reversed.

FFE is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of two New York Times bestsellers, *Tales from the Left Coast: True Stories of Hollywood Stars and Their Outrageous Politics* and *Hollywood Nation: Left Coast Lies, Old Media Spin, and the Revolution*. Mr. Hirsen has taught law school courses on constitutional law.

SUMMARY OF ARGUMENT

The Tenth Circuit panel analyzed this case as a simple matter of private speech in a traditional public forum. We urge the Court to reject this mechanical approach and craft a ruling that protects the editorial discretion of the city without stifling private expression.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten (10) days prior to the due date of *amicus curiae's* intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

This Court has an opportunity to sharpen the line between government and private speech, and to fashion an approach to clear the fog in future cases. Pleasant Grove City has sponsored an exhibit of permanent monuments to make a statement about its history. The city is the "speaker" even though some individual structures are engraved with private speech. The religious content in some of that speech does not disturb the conclusion, because the city may permissibly acknowledge the role of religion in local history.

Analysis of the forum is not as straightforward as the Tenth Circuit panel presumes. In certain contexts, this Court has found that forum analysis is inapplicable. Pioneer Park's historical display is more like a government museum or library than a traditional public forum for assembly and debate. The exhibit shares some characteristics with a limited public forum, because the city has limited the content to historically relevant structures or donations from persons with close ties to the community. But the city has not intentionally opened any type of forum for private speech, nor has it hindered such expression.

A decision in favor of the city will maximize protection for both public and private expression. The park exhibit, like many similar displays throughout the country, disseminates a government-sponsored message. People may still visit the park to freely exchange ideas through oral and written communications. But if the city is forced to either ban *all* permanent monuments in the park or accept *every* proposed donation, the result will either be a chilling of expression or an array of clutter. Neither choice

promotes the free expression guaranteed by the First Amendment.

I. THE CITY IS SPEAKING ABOUT ITS LOCAL HISTORY. A DECISION IN FAVOR OF THE CITY POSES NO THREAT TO PRIVATE SPEECH.

The Tenth Circuit analyzed this case as a simple matter of private speech in a traditional public form. But it is not that simple. Pleasant Grove is entitled to display a message about its history, but private speech is embedded in its expression. This Court can and should craft a ruling in favor of the city that will not stifle private expression. Pleasant Grove owns, controls, and maintains the permanent structures used to craft its message about local history. City officials, like museum curators or public librarians, exercise editorial discretion in approving additions to the display, according to well-established policies and procedures. The city has not extended an invitation to private speakers so as to create a forum for private expression.

The line between public and private expression is sometimes blurred but it must be drawn. Private speech on public property is protected by the First Amendment, so courts must identify the forum and assess the reasons for exclusion. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). Public speech is governed by an entirely different set of rules. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995).

Even the Tenth Circuit judges who would have granted a rehearing disagree about the nature of the speech. Judge Lucero labels the monuments private speech because private donors determine the content prior to the city's acceptance. *Summum v. Pleasant Grove City,* 499 F.3d 1170, 1172 (10th Cir. 2007) (Lucero, J., dissenting from denial of rehearing en banc). Judge McConnell regards them as government speech because the city did not invite private citizens to erect structures on government land. *Id.* at 1175-76 (McConnell, J., dissenting from denial of rehearing en banc). This Court is faced with the delicate task of untangling the web before proceeding to classify the forum, if indeed there *is* a forum.

A. The Four-Factor Test Developed By Circuit Courts Weighs In Favor Of Pleasant Grove City At Every Point.

This case does not require a balancing test. It is not a close call. However, the test used by several circuit courts is a helpful analytic tool to sharpen the line between public and private speech. Moreover, Respondent's Br. in Opp. to Cert. notes the Tenth Circuit's reliance on this test to analyze government speech. When applied correctly to *Pleasant Grove*, the presence of government speech is evident.

Some courts suggest that it is an "oversimplification [to assume] that all speech must be either that of a private individual or that of the government and that a speech event cannot be *both* private and governmental at the same time." *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles,* 305 F.3d 241, 244-45 (4th Cir. 2002);

Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004). The Fourth Circuit struck down South Carolina's "Choose Life" license plate scheme as "cloaked advocacy" that lacked accountability to the electoral process--holding that the plates were a mixture of government and private speech. *Planned Parenthood of S.C., Inc. v. Rose, supra,* 361 F.3d at 795-796. The same court invalidated a logo restriction on special plates authorized in Virginia, finding an impermissible restraint of private speech. *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, supra,* 305 F.3d 241. These and other circuit cases have met the speech classification challenge using a four-factor test from the Eighth Circuit. *See Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000). More recently, the Ninth Circuit adopted this test, finding it consistent with *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2007). The Sixth Circuit, however, criticized the district court for using this "pre-*Johanns*" test based on Fourth Circuit precedent. *Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 372 (6th Cir. 2006). A careful reading of *Johanns* reveals it to be in harmony with the four-factor test. The opinion does not expressly reference it but all the elements are present.

The gap between Judges Lucero and McConnell can be understood by examining all four factors rather than limiting the analysis to only one of them. Every one of these factors overwhelmingly supports the city.

1. The Purpose Of The Pioneer Park Display Is To Commemorate The History Of The City--Not To Facilitate The Free Exchange Of Ideas.

Governments institute programs for many purposes--to raise revenue, allocate funding, regulate conduct, promote its policies, and disseminate messages. Government must speak in order to conduct business and accomplish its purposes. There is a delicate and increasingly complex relationship between government and private speech. Discerning the government's purpose helps to identify the speaker and apply free speech principles.

When government acts as regulator or raises revenue, the First Amendment restrains its ability to limit private speech. The Ninth Circuit found that raising revenue was the purpose of Arizona's special license plate program. The state was facilitating private speech rather than publishing a message of its own, so it could not engage in viewpoint discrimination. *Arizona Life Coalition, Inc. v. Stanton, supra*, 515 F.3d at 996.

Sometimes government disseminates its own message. The purpose of the beef promotions in *Johanns* was to publicize a message established by the federal government. *Johanns v. Livestock Marketing Ass'n, supra*, 544 U.S. at 560-561. Government may send an indirect message of support through selective funding. *Rust v. Sullivan*, 500 U.S. 173 (1991). Governments may even enter the arena of public debate. Private speakers retain the right to disagree

but cannot compel the government to sponsor a competing viewpoint:

> Government can certainly speak out on public issues supported by a broad consensus, even though individuals have a *First Amendment* right not to express agreement. For instance, government can distribute pins that say "Register and Vote".... Citizens clearly have the *First Amendment* right to oppose such widely-accepted views, but that right cannot conceivably require the government to distribute "Don't Vote" pins....
>
> *Am. Civil Liberties Union of Tenn. v. Bredesen, supra,* 441 F.3d at 379

Some courts caution that government should clearly identify itself as the speaker. The Fourth Circuit invalidated South Carolina's "Choose Life" license plate program as "cloaked advocacy," finding the speech had a mixed chararcter. The government was promoting a message, but its identity was obscured by the use of private speakers and their vehicles. *Planned Parenthood of S.C., Inc. v. Rose, supra,* 361 F.3d 786. Similarly, dissenting justices in *Johanns* expressed concern that the government maintain political accountability by identifying itself with the content so readers would understand the source of the message. *Johanns v. Livestock Marketing Ass'n, supra,* 544 U.S. at 571-572 (Souter, J., dissenting).

This first prong should not be viewed in isolation from analysis of the forum. When government

establishes a program to encourage an exchange of diverse private viewpoints, it creates a forum for private expression and contrary views may not be suppressed. However, forum analysis may be inappropriate where such intent is lacking. The Eight Circuit held that brief messages from sponsors and announcements of their names on a public radio station constituted government speech. The court reasoned that "the central purpose of the enhanced underwriting program is not to promote the views of the donors." *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., supra*, 203 F.3d at 1093-94.

The Tenth Circuit has applied *Knights* and reached different results on the purpose prong. In an earlier Summum case, the court concluded that a Ten Commandments monument represented the private speech of the Eagles group that donated it to promote a moral code for youth. The monument was not displayed to promote the views of the city. *Summum v. City of Ogden,* 297 F.3d 995, 1004 (10th Cir. 2002). But in another case, the Tenth Circuit considered Denver's decision to erect an annual holiday display with a brief message and concluded that "the sign is there to thank the sponsors and the citizens for their support of the cost of the display." The "thank you" message was city speech. *Wells v. City & County of Denver,* 257 F.3d 1132, 1141 (10th Cir. 2001).

Pleasant Grove City did not invite its citizens to exchange their ideas by erecting permanent monuments, nor has it advocated one side of a volatile public controversy. It created an exhibit using government-owned structures to disseminate a

message about the city's pioneer-era history. As the Tenth Circuit explained in *Wells*:

> Upon consideration, we conclude that the City of Denver is entitled to present a holiday message to its citizens without incurring a constitutional obligation to incorporate the message of any private party with something to say. "Simply because the government opens its mouth to speak does not give every outside individual or group a *First Amendment* right to play ventriloquist." *Downs v. Los Angeles Unified School District,* 228 F.3d 1003, 1013 (9th Cir. 2000).

Wells v. City & County of Denver, supra, 257 F.3d at 1143

2. The City Exercises Editorial Discretion In Selecting Items To Display, Based On Historical Relevance And The Speaker's Ties To The Community.

Government control over content is one key to identifying the speaker. In *Johanns*, the Secretary of Agriculture held final authority to approve every word used in the beef promotional campaign that this Court found to be government speech. *Johanns v. Livestock Marketing Ass'n, supra,* 544 U.S. at 561. The public radio station in *Knights* exercised editorial control over the content of scripts acknowledging its sponsors, so the speech was attributed to government. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., supra*, 203 F.3d at 1093-94. The Ninth Circuit ruled that school bulletin boards were government speech

even though individual employees posted messages on them, because the school maintained editorial control over content. *Downs v. Los Angeles Unified School District, supra,* 228 F.3d at 1011. But the same court found this factor weighted toward private speech in Arizona's specialized license plate program. The state exercised de minimus editorial control over design and none over the message. *Arizona Life Coalition, Inc. v. Stanton, supra*, 515 F.3d at 966.

Editorial control should not be considered in a vacuum. Such a truncated approach may yield erroneous results. The Sixth Circuit used *Johanns* to conclude that a "Choose Life" license plate was Tennessee's own message because the state had to approve every word on the plates--regardless of whether the government explicitly credited itself as the speaker, and even though a private organization participated in designing the logotype. *Am. Civil Liberties Union of Tenn. v. Bredesen, supra,* 441 F.3d at 375, 377. This conclusion places the Sixth Circuit in tension with other license plate cases that consider a broader range of factors. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, supra,* 288 F.3d 610; *Planned Parenthood of S.C., Inc. v. Rose, supra,* 361 F.3d 786; *Arizona Life Coalition, Inc. v. Stanton, supra*, 515 F.3d 956; *Choose Life of Missouri, Inc. v. Vincent*, 2008 U.S. Dist. LEXIS 6524 (W.D. Mo. January 23, 2008). Some courts find private speech where a government entity accepts the donation of a monument with the donor's completed message intact. In *Ogden*, for example, the Tenth Circuit observed that the city received a completed Ten Commandments statue from the Eagles and exercised no control over its content. *Summum v. City of Ogden, supra,* 297

F.3d at 1004; see also *Summum v. Callaghan,* 130 F.3d 906, 913-914 (10th Cir. 1997) (presupposing a similar structure to be private religious speech).

Pleasant Grove City exercises discretion in its selection of structures to display, based on historical relevance and/or the donor's ties to the community. The city does not inscribe the words on the monument, but does choose whether to accept or reject a particular item based on these criteria. The collection displayed in Pioneer Park, as a whole, conveys a message from the city government about its history. The park exhibit is analogous to a government museum or library, where government employees select artifacts or books for the collection. Museums do not adopt the individual text engraved on every artifact. Public libraries do not endorse the words of every book. In both cases, there is no forum for private expression even though some selections contain private speech.

3. The City Is The Literal Speaker As Compiler Of The Display, Although The Private Donor Crafted The Message On The Monument.

The *Johanns* concurrence observed that if the government's pro-beef messages could be attributed to private individuals or organizations, there would be a valid as-applied challenge. *Johanns v. Livestock Marketing Ass'n, supra,* 544 U.S. at 564-565 (Thomas, J., concurring). The concurrence implicitly acknowledged the importance of identifying the literal speaker. The dissent objected that no one reading the ads would realize that the message, "funded by America's Beef Producer's," is actually from the federal

government. *Id.* at 577. This objection seemed rooted in the obscurity of the literal speaker's identity.

The license plate cases illustrate how private speech interests are implicated when a message is literally broadcast by private individuals. The state owns the plates, but they are attached to private vehicles. This third factor is somewhat mixed--government ownership coupled with private possession--but the close association with private speakers weighs in favor of protecting private speech. *Arizona Life Coalition, Inc. v. Stanton, supra*, 515 F.3d at 966-967.

In a case similar to the one at bar, the Tenth Circuit found a Ten Commandments monument to be private speech because the donor composed the speech and no municipal employee was the literal speaker. *Summum v. City of Ogden, supra,* 297 F.3d at 1004. In *Knights*, the literal speaker was an employee of the public radio station, not a representative of the private entity seeking air time. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., supra*, 203 F.3d at 1091.

But this "literal speaker" factor must not be taken too literally. In a critical sense Pleasant Grove City *is* the speaker. The amalgamation of monuments, while containing private expression, is a collective "whole." The city is not parroting the words engraved on individual monuments, but through the completed exhibit says: "This is our pioneer-era history." Forced intrusion of the Summum monument would distort that message. The display is analogous to a collective work recognized by federal copyright law, wherein the

pre-existing materials of several authors are assembled and collected such that the resulting whole is an original work of authorship. *See* 17 U.S.C. § 201(c). In such a collection, as in Pioneer Park, the individual contributors speak but the compiler expresses a separate and distinct message. In the context of public radio or television, a compilation of third party speech has been deemed a "communicative act of the government." *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., supra*, 203 F.3d at 1094, n. 9; *Arkansas Educational Television Commission v. Forbes,* 523 U.S. 666, 674 (1998). Here, too, the city communicates its message by assembling the works of third parties.

4. The City Has Assumed Ultimate Responsibility By Accepting The Donation And Using The Monument To Craft A Government-Sponsored Message.

This Court has provided a coherent example of ultimate responsibility:

> *The Beef Promotion and Research Act of 1985 (Beef Act or Act), 99 Stat. 1597*, announces a federal policy of promoting the marketing and consumption of "beef and beef products," using funds raised by an assessment on cattle sales and importation. *7 U.S.C. § 2901(b).* The statute directs the Secretary of Agriculture to implement this policy....
>
> *Johanns v. Livestock Marketing Ass'n, supra,* 544 U.S. at 553

The government's message here was required by federal law, and a governmental agency was directed to broadcast it.

Where tangible property is used to transmit a message, ownership of that property is an important consideration. Formal transfer of legal title may constitute a transfer of imputed expression. *Freedom From Religion Fdn. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000). Personalized license plate cases suggest that private speech interests may be implicated even when the government holds legal title. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, supra*, 288 F.3d at 621; *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). The Ninth Circuit found no indication that Arizona intended to adopt the message of each special organization plate as its own. *Arizona Life Coalition, Inc. v. Stanton, supra*, 515 F.3d at 968. Individuals mount government-owned plates on their personal vehicles and choose personalized messages as a means of private expression. The state holds title but the individual has possession and displays the message.

The license plate cases are readily distinguished from *Pleasant Grove*. When a monument is donated to a city, the government assumes legal title, possession, and control. Pleasant Grove City assumes ultimate responsibility for a monument in Pioneer Park when officials determine that a particular statue meets the "historical relevance" criteria and the donation is accepted. After acquiring title, the city may sell, donate, modify, move, or destroy the structure and is responsible for its maintenance. *Summum v. City of Ogden, supra*, 297 F.3d at 1005. The city need not

adopt every word engraved on every monument as its own, but each item displayed contributes to the overall message concerning local pioneer history.

B. This Is Not An Establishment Clause Case Merely Because Religious Artifacts Are Displayed. The Government's Intent Is To Visually Describe The City's History, Not To Prescribe Religious Doctrine.

The public-private speech dichotomy is particularly critical where religious expression is involved:

> "There is a crucial difference between *government* speech endorsing religion, which the *Establishment Clause* forbids, and *private* speech endorsing religion, which the Free Speech and *Free Exercise Clause* protects."
>
> *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 250 (1990)

There is no Establishment Clause challenge before this Court. However, the issue lurks in the background. Pioneer Park displays both the Ten Commandments and a Mormon religious artifact (the Nauvoo Temple Stone), but refuses the proposed Summum monument based on its lack of historical relevance. Under the Tenth Circuit's criteria for government speech--actual adoption of the words on the monument--a challenge to the two religious displays is possible. But if the text is purely private speech, Pleasant Grove may be forced to accept the Summum monument.

Some of Judge McConnell's citations highlight this concern: *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000). *Summum v. Pleasant Grove City*, *supra*, 499 F.3d at 1176 (McConnell, J., dissenting from denial of rehearing en banc). These cases all held that privately donated monuments containing religious text constituted government speech, and went on to find Establishment Clause violations on that basis.

The key to this conundrum lies in examining governmental intent. Some religious monuments displayed on public property pass constitutional muster. There is an Establishment Clause violation when government "speaks" to promote or endorse a particular religious viewpoint but not when a passive display acknowledges the role of religion in American history:

> "The fact that government buildings continue to preserve artifacts of [the country's religious] history does not mean that they necessarily support or endorse the particular messages contained in those artifacts."
>
> *Modrovich v. Allegheny County*, 385 F.3d 397, 410-11 (3d Cir. 2004)

This Court upheld the display of a Ten Commandments monument on the grounds of the Texas state capitol, a 22-acre area containing seventeen monuments and twenty-one historical markers described by a state legislative resolution as

commemorating the "people, ideals, and events that compose Texan identity." *Van Orden v. Perry*, 545 U.S. 677, 681 (2005). This context--an exhibit honoring local history--is remarkably similar to the Pioneer Park display. The Decalogue has religious significance but has also played a significant role in America's heritage that governments may acknowledge through a passive display on public property. *Id.* at 690-692; *see also ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005).

Similarly, government may display art with religious content in an exhibit. A university's exhibition of a statue titled "Holier Than Thou," offensive to the Catholic plaintiffs who sued to have it removed, did not violate the Establishment Clause. The university exercised editorial discretion in the selection of artwork and had no improper religious motivation. *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2004). In the same way, Pleasant Grove City may display historically relevant items that acknowledge the role of religion in local history.

II. FORUM ANALYSIS IS INAPPLICABLE. THE CITY HAS CRAFTED A GOVERNMENT MESSAGE THAT NEITHER FACILITATES NOR ABRIDGES PRIVATE SPEECH.

Pioneer Park officials may exercise editorial discretion without opening a forum for private expression. The city's policy--to display permanent monuments based on historical relevance or ties to the community--does not abridge free speech rights or cut off any existing channels of communication. Citizens may continue to visit the park for assembly, debate,

and similar activities traditionally associated with public parks.

A. The Park Exhibit Is Analogous To A Government Museum Or Library. The City Is Entitled To Exercise Editorial Discretion In Selecting Items For Display.

Governments have authority to make a variety of decisions about the use of public assets and resources without necessarily opening the floodgates to every person seeking to exercise a constitutional right. The government may selectively fund activities in the public interest, determining the contents and limitations of a program it creates and manages. *Rust v. Sullivan, supra,* 500 U.S. 173 (regulations limited ability of Title X recipients to engage in abortion-related activities); *Planned Parenthood of S.C., Inc. v. Rose, supra,* 361 F.3d at 796. It can make decisions about the use of its own land that incidentally burden free exercise rights. *Lyng v. v. Northwest Indian Cemetery Protective Ass'n et al.*, 485 U.S. 439 (1988) (roads constructed by U.S. Forest Service on land considered sacred by three Indian tribes).

In some contexts, the government plays a unique editorial role that does not lend itself to the traditional forum analysis where private speakers seek access to public property. Court have recognized and extended this doctrine in recent years. The government may act as patron of the arts, making aesthetic judgments in selecting projects to fund. *Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569 (1998). This is true even where public sidewalks and parks are used for a government-sponsored exhibit. *PETA v. Gittens*, 414

F.3d 23 (D.C. Cir. 2005) (animal artwork). A losing Presidential candidate could not reasonably assert a right to present his own float in the Inaugural Parade. *Id.* at 30. Public television broadcasters are entitled to exercise journalistic discretion. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998). Public librarians enjoy broad discretion in making collection decisions. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003). Public schools, similarly, make content-based decisions about curriculum. *Rosenberger v. Rector & Visitors of the Univ. of Va., supra*, 515 U.S. at 833.

In all of these situations, a substantial amount of protected private speech is excluded from government funding, sponsorship, or display without violating the First Amendment or even creating a forum that implicates free speech rights. The Tenth Circuit acknowledges this principle but would not extend it beyond the specific situations recognized by this Court--public television, libraries, and the arts. *Summum v. City of Duchesne*, 482 F.3d 1263, 1269 (10th Cir. 2007); *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1052, n.4 (10th Cir. 2007). This short-sighted, mechanical approach fails to appreciate the variety of analogous situations.

The Pioneer Park exhibit is similar to a government museum. *See PETA v. Gittens, supra*, 414 F.3d at 29; *Planned Parenthood of S.C., Inc. v. Rose, supra*, 361 F.3d at 795. A museum curator may select items consistent with the museum's theme without creating a forum for private speech or an obligation to display every proposed donation. The city council is analogous to the museum curators, librarians, public

school officials, and public television broadcasters who select appropriate materials for government-sponsored activities. Private expression is embedded in some of those materials. The government does not adopt all such speech as its own words, nor does it create a forum requiring acceptance of every artifact, monument, book, or other article proposed by a private speaker. Forum analysis is inappropriate in this context.

Moreover, public libraries, museums, television, schools, and similar activities easily pass the Eighth Circuit's four-factor test discussed in Section I. There is a benefit to the public, but the purpose is not to facilitate private speech. Government exercises editorial discretion. Government agents or physical displays are the literal speaker. Government has ultimate responsibility for content, property, financing, and maintenance.

B. Park Visitors Remain Free To Engage In Expressive Activities Traditionally Associated With A Public Forum.

Even in a traditional public forum, no person has an unrestricted right to erect a permanent structure. The use of portable, temporary, non-obstructive props may be entitled to First Amendment rights on public property. *Tucker v. City of Fairfield*, 398 F.3d 457 (6th Cir. 2005) (balloons used one or two hours in a union protest). But objects that are permanent or not easily moved do not qualify for similar protection. *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (no right to erect newsstands on a public sidewalk); *Lubavitch Chabad House v. City of Chicago*, 917 F.2d 341 (7th

Cir. 1990) (no right to display freestanding Chanukah menorah in public area of airport).

The city does not abridge free speech rights through its restrictions on permanent monuments in Pioneer Park. In *Finley*, Justice Scalia observed that "those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute [requiring the NEA to consider decency in its funding decisions]." *Nat'l Endowment for the Arts v. Finley, supra,* 524 U.S. at 595. Similarly, Summum followers remain free to meet in municipal parks for assembly, debate, and the free exchange of ideas. They can pass out fliers, speak to people, and freely disseminate their ideas. They can erect monuments on their own property in full public view. What they cannot do is inject their structure into a city-sponsored historical exhibit.

III. THERE IS NO FORUM--PUBLIC OR LIMITED--MERELY BECAUSE OF SURFACE SIMILARITIES.

Pioneer Park's exhibit bears some resemblance to a forum for private expression, but the similarities are illusory. Its setting in a public park does not automatically render it a traditional or designated public forum, and while it shares certain features with limited public fora--topic and speaker restrictions--the government's purpose for the display rules out even this classification.

A. Even If There Were A Forum, It Would Be Limited To "Permanent Structures In Pioneer Park"--Not The Entire Park.

Identification of the relevant forum requires consideration of both the government property to which access is sought and the type of access sought. *Summum v. City of Ogden, supra,* 297 F.3d at 1001; *see Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., supra,* 473 U.S. at 800-02. The Tenth Circuit gives lip service to this principle, even proclaiming that "the permanent monuments in the city park therefore make up the relevant forum," but then brushes it aside and aborts the analysis. *Summum v. Pleasant Grove City, supra,* 483 F.3d at 1050.

1. The Analysis Begins--But Does Not End--With The Observation That The Property Is A Public Park.

Free speech cases have considered a variety of government properties, including parks, municipal buildings, county courthouse grounds, and sidewalks. The property at issue here is a municipal park. The Tenth Circuit panel goes no further than reciting basic black letter law, dismissing the District Court's nonpublic forum analysis: "The city park is, however, a traditional public forum." *Summum v. Pleasant Grove City, supra,* 483 F.3d at 1050. But the location and nature of the property is only one of two factors to be examined. The panel disregards the second factor and thereby short-circuits the forum analysis that follows. As Judge Lucero pointed out:

> The panel's claim that access "is relevant in defining the forum, but . . . does not determine the nature of that forum," *id. at 1269 n.1*, confuses the forum analysis. Only by defining the forum with reference to the access sought can a court determine the nature of that forum.
>
> *Summum v. Pleasant Grove City, supra*, 499 F.3d at 1172 (Lucero, J., dissenting from denial of rehearing en banc))

2. Summum Seeks Access To Erect A Permanent Monument, Not To Engage In Assembly Or Debate.

In the past, the Tenth Circuit has noted the distinction between transitory speech and permanent structures on public property:

> Here, the government property at issue is the lawn of the Ogden City municipal building. The access sought is not merely to converse or post temporary signs on the lawn, but the right to place permanent monuments on the lawn: hence the relevant forum is "permanent monuments on the lawn of the Ogden City municipal building."
>
> *Summum v. City of Ogden, supra*, 297 F.3d at 1002

Somehow that distinction was lost in the shuffle. In *Ogden*, the property at issue was a municipal building rather than a park, so the court continued the analysis and concluded there was a limited forum for the

erection of permanent structures. Since the city had not provided evidence of a pre-litigation policy to exclude the proposed Summum monument based on its lack of historical relevance, the court ruled against it. *Summum v. City of Ogden, supra,* 297 F.3d at 1006.

Apparently, in the Tenth Circuit, no sort of limited forum can ever be created within the confines of a public park. But this Court has advised that a more thorough analysis is required when limited access is sought by a speaker:

> When speakers seek general access to public property, the forum encompasses that property.... In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.
>
> *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., supra,* 473 U.S. at 801

Examples abound: *Perry Local Educators' Assn. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983) (a public school's internal mail system and teachers' mailboxes); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300 (1974) (advertising spaces on city-owned buses); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, supra,* 288 F.3d at 625 (Virginia's special license plate program); *Air Line Pilots Ass'n, Int'l v. Dept. of Aviation of Chicago,* 45 F.3d 1144, 1151-52 (7th Cir. 1995) (airport display cases rather than the airport itself); *Texas v. Knights of the Ku Klux Klan,* 58 F.3d 1075, 1078 (5th Cir. 1995) (Adopt-A-Highway

Program program as a whole rather than the State's highways or a particular sign).

The tailored *Cornelius* approach is exactly what is needed here. The access Summum followers seek is not general access to the park for assembly and debate, but limited access to erect a permanent monument. The Tenth Circuit opinion is fatally flawed from the outset in failing to make this critical distinction.

B. Pioneer Park's Historical Display Is Neither A Traditional Nor A Designated Public Forum.

The Tenth Circuit decision hinges on the assumption that the park is a public forum--period. That presupposition is critical, because Summum's asserted right to display its monument in Pioneer Park depends on whether the applicable forum is public or instead is reserved for specific official uses. *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 761 (1995).

1. The Park Is A Traditional Public Forum For Assembly And Debate, But Not For The Erection Of Permanent Structures.

The city must allow assembly and debate in its streets and parks, which "by long tradition or by government fiat have been devoted to assembly and debate." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., supra,* 473 U.S. at 802; *Hague v. CIO,* 307 U.S. 496, 515 (1939). But the constitution does not

require it to open an unrestricted forum for permanent structures:

> Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.
>
> *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., supra,* 473 U.S. at 799-800

The decision below fails to distinguish the transitory expression traditionally associated with public fora--speech, assembly, handbills--from the erection of permanent structures. The difference is monumental. Traditional public fora are defined not only in terms of the type of property--streets, parks, sidewalks--but also on the type of access sought:

> By tradition and precedent, city parks -- as "traditional public forums" -- must be open to speeches, demonstrations, and other forms of **transitory expression**. But neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties.

> *Summum v. Pleasant Grove City, supra*, 499 F.3d at 1175 (McConnell, J., dissenting from denial of rehearing en banc) (emphasis added)

The Tenth Circuit justifies its conclusion by stating that:

> The city may further its interest in promoting its own history by a number of means, but not by restricting access to a public forum traditionally committed to public debate and the free exchange of ideas.
>
> *Summum v. Pleasant Grove City, supra*, 483 F.3d at 1054

The court relies on a statement from Justice Kennedy's concurring opinion in *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), that government may not "assert broad control over speech or expressive activities" in a public forum unless it alters the objective physical character or uses of the property and bears the costs. *Id.* at 700 (Kennedy, J., concurring). The court goes on to suggest that the city could simply ban <u>all</u> permanent monuments as a reasonable time-place-manner restriction. *Summum v. Pleasant Grove City, supra*, 483 F.3d at 1054.

But the city has not asserted the sort of broad control over expression that is prohibited in a public forum. Prior to setting up its historical exhibit, private speakers were not at liberty to construct permanent monuments in Pioneer Park. They have not acquired that right merely because the city has chosen to set up a display to highlight local history.

Oral communication and distribution of literature is not equivalent to more permanent means of expression that is not the hallmark of a traditional public forum. For example, private speakers are not necessarily entitled to post signs on public property where the prohibition does not curtail their existing freedom to speak:

> While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places...a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. [citations] The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited.
>
> *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)

This Court found reliance on the public forum doctrine to be misplaced in this case, because there was no traditional right to access utility poles for communication comparable to that recognized for public streets and parks. *Id.* at 814. Although Pleasant Grove's exhibit is in a city park, there is no traditional right to erect structures comparable to the right to speak, assemble, and hand out literature.

2. The City Has Not Granted Open Access To Pioneer Park For The Erection Of Permanent Structures.

In a factually similar Summum case, the Tenth Circuit explained that:

> ... the City asserts that no constitutional right exists to erect a permanent structure on public property. We do not need to address that proposition in its most general application, however, because in any event it does not apply when the government allows some groups to erect permanent displays, but denies other groups the same privilege.... ("*First Amendment* jurisprudence certainly does mandate that if the government opens a public forum to allow some groups to erect communicative structures, it cannot deny equal access to others because of religious considerations . . . .")
>
> *Summum v. Duchesne City, supra,* 482 F.3d at 1274

But Pleasant Grove City has not opened Pioneer Park to "some groups" to erect permanent structures as a means of private expression. Its purpose in creating the exhibit was to communicate a government-sponsored message commemorating local history, not to establish an open forum for private speakers. The city has not allowed the "general access" or "indiscriminate use" that characterizes a designated public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, supra,* 460 U.S. at 47. Officials have not created a designated public forum for

expressive activity that bind it to the standards applicable to a traditional public forum.

3. If The City Is Forced Into An All-Or-Nothing Position, There Would Either Be An "Array Of Clutter" Or An Unnecessary Chilling Of Expression. Neither Alternative Is Acceptable.

When this Court decided *Forbes*, it was mindful of the threatened "cacophony" that could result if all political candidates had to be provided air time. Moreover, the Court commented on the desirability of encouraging private expression to the fullest extent feasible:

> The *Cornelius* distinction between general and selective access furthers *First Amendment* interests. By recognizing the distinction, **we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all.** That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Ark. Educ. Television Comm'n v. Forbes, supra, 523 U.S. at 680 (emphasis added)

The *Forbes* "cacophony" is analogous to the probable "influx of clutter" if Pleasant Grove is required to accept any and all donations for Pioneer Park. *Summum v. Pleasant Grove City, supra*, 499 F.3d at 1175 (McConnell, J., dissenting from denial of rehearing en banc). Ironically, while a decision in favor of Summum appears to protect free speech, it would actually chill a substantial amount of expression by foreclosing government-sponsored messages that in no way infringe the traditional rights of private speakers.

C. The Park Exhibit Is Not A Limited Public Forum In Spite Of Some Shared Characteristics.

If Pleasant Grove had extended an invitation to private speakers using its established criteria, there would be a classic limited forum based on characteristics established by this Court and acknowledged in the Tenth Circuit:

> The government may limit speech in a nonpublic forum to reserve the forum for the specific official uses to which it is lawfully dedicated.... When the government allows selective access to some speakers or some types of speech in a nonpublic forum, but does not open the property sufficiently to become a designated public forum, it creates a "limited public forum." See *Rosenberger, supra*, 515 U.S. at 829-30; *Lamb's Chapel v. Center Moriches*

Union Free Sch. Dist., 508 U.S. 384, 390-92 (1993).

Summum v. Callaghan, supra, 130 F.3d at 916

Pleasant Grove's objective criteria appear to fit the limited public forum mold. Officials consider content (historical relevance) and the type of speaker (those with close ties to the community). However, these criteria were instituted to define the city's own message, not to create an opportunity for private expression.

1. Forum Analysis Must Consider <u>All</u> The Facts And Circumstances.

Even if there were a forum, the analysis is not always straightforward. Sometimes a forum has spatial boundaries or time limitations within a larger area. Pioneer Park's exhibit does not encompass the entire park property, nor does it interfere with the oral and written communications historically associated with public fora. The Tenth Circuit mechanically assumes that a public park must always constitute a traditional public forum, regardless of the mode of expression or limitations as to time or space. The panel distinguishes earlier Tenth Circuit decisions in *City of Ogden* and *Callaghan* because the properties involved there--a municipal building and courthouse lawn--were not the kind of property which has "immemorially been held in trust for the use of the public." *Summum v. Pleasant Grove City, supra*, 483 F.3d at 1051, citing *Hague v. CIO, supra*, 307 U.S. at 515. The court reasoned that the particular means of communication--display of monuments--was relevant

to defining the forum but not its classification as public or nonpublic. *Id.* at 1051.

The Tenth Circuit made a similar analytical error in *Eagon v. City of Elk City,* 72 F.3d 1480 (10th Cir. 1996). Individuals sued Elk City for violating their free speech rights after officials excluded their display from "Christmas in the Park," an annual event during which individuals and groups were permitted to erect displays in Ackley Park. The court defined the forum as "Ackley Park during the 'Christmas in the Park' event," but erroneously classified it as a public forum. *Id.* at 1487. Although the forum encompassed the entire park and invited general participation, it was limited to a particular time frame and content--displays related to the holiday season. The rejected display, "Merry Christmas from the Beckham County Teenage Republican Club," fit the criteria but was excluded due to its partisan nature. The Tenth Circuit could have ruled in favor of the plaintiff club by finding impermissible viewpoint discrimination in a limited public forum, rather than ignoring the forum parameters altogether.

Although streets, parks, and sidewalks have historically been recognized as traditional public fora, the particular type of government property is not always conclusive. Public sidewalks are normally public fora, but in *United States v. Kokinda,* 497 U.S. 720 (1990), this Court concluded that the sidewalk in front of a post office was a nonpublic forum and upheld postal regulations banning solicitation on the sidewalk. It is crucial to look at all the facts and circumstances, including the mode of expression, to classify the appropriate forum.

2. A Limited Public Forum Could Be Created To Commemorate Local History, But The Pioneer Park Exhibit Is Solely A City-Sponsored Message.

A previous Tenth Circuit decision left open the possibility that a city might create a limited public forum based on historical relevance:

> We do not conclude that a municipality may never maintain a nonpublic forum to which access is controlled based upon "historical relevance" to the given community. Rather, we conclude only that, here, the City of Ogden failed to employ adequate safeguards to ensure that the "historical relevance" criterion did not devolve into a mere post hoc facade for viewpoint discrimination.
>
> *Summum v. City of Ogden, supra,* 297 F.3d at 1006

Ogden was unable to show evidence of a policy that it would allow it to display the Ten Commandments monument but reject the Summum's Seven Principles monument. The lack of such a policy resulted in an unreasonable risk of viewpoint discrimination. *Id.* at 1009.

Unlike Ogden, Pleasant Grove does have an established policy that officials have followed for many years. The Tenth Circuit panel acknowledges the *Ogden* holding but rejects its applicability solely because the historical display is in a city park:

> In *City of Ogden*, however, we simply noted that we were *not* deciding that a city "may never maintain a *nonpublic* forum to which access is controlled based upon 'historical relevance' to the given community." *297 F.3d at 1006* (emphasis added). In other words, we left open the question whether a city could limit access to a nonpublic forum based on historical relevance. More important, we did not express any opinion about the use of historical relevance criteria to justify content-based discrimination in a public forum.
>
> *Summum v. Pleasant Grove City, supra*, 483 F.3d at 1053

The Tenth Circuit acknowledges the potential for a limited public forum to commemorate local history but assumes that a public park could never be the physical setting for such a forum. That conclusion bypasses the nature of the access sought. Moreover, Pleasant Grove is acting as actual sponsor of the message about its history. The city has not invited speakers to set up privately owned displays concerning that topic.

3. Pleasant Grove Has Not Engaged In Viewpoint Discrimination Against Summum.

As the "speaker," Pleasant Grove City may favor certain speech on the basis of viewpoint. But even if this Court were to classify the park exhibit as a limited forum for private speech, there is no apparent viewpoint discrimination that would preclude officials from rejecting the Summum monument. The Pioneer

Park display is descriptive of the city's history, not prescriptive. Summum's monument is excluded because it is not describe any aspect of city history. The display includes two religious structures, the Ten Commandments and an ancient Mormon artifact from a religious temple. Both are relevant to the city's visual description of local history. The city makes no claim to prescribe religious doctrine or to endorse Judaism, Christianity, or Mormonism. Its passive display--like the one in *Van Orden*--acknowledges the role of religion in city history.

CONCLUSION

The Foundation for Free Expression urges this Court to find that the Pioneer Park historical display is the speech of Pleasant Grove City. The city has sponsored a descriptive message about its history without adopting the individual language contained on every display item. Moreover, its exhibition of historically relevant artifacts containing religious texts does not constitute government endorsement of any particular religion.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, ET AL.,
Petitioners,

v.

SUMMUM, a corporate sole and church,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, NATIONAL CLERGY COUNCIL, AND FAITH AND ACTION IN THE NATION'S CAPITAL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

1. Whether the Tenth Circuit Court of Appeals erred in ruling that Pleasant Grove City violated the Free Speech Clause of the First Amendment by refusing a Summum request to display a "Seven Aphorisms" monument in the city's park.

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

Foundation for Moral Law

Amicus curiae Foundation for Moral Law[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning religious freedom, the sanctity of life, and others that implicate the fundamental freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because it believes that the concept of free speech has been warped by the courts to include types of expression never intended to be protected by the First Amendment. Only the original understanding of the First Amendment's Free Speech Clause will yield a

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[1] *Amici curiae* Foundation for Moral Law, National Clergy Council, and Faith and Action in the Nation's Capital file this brief with consent from both Petitioners and Respondent. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici's* intention to file this brief. Counsel for *amici* authored this brief in its entirety. No person or entity—other than *amici*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

proper result in this case and others like it, and the need for constitutional fidelity drives the Foundation's legal advocacy.

National Clergy Council

Amicus curiae National Clergy Council (NCC) is a network of church leaders from Catholic, Evangelical, Orthodox and Protestant traditions. The NCC uses their voices, pens and pulpits to address the critical issues of the day and bring to them a proper perspective, informed by the Word of God and classical Christian moral instruction.

The NCC has a vested interest in religious liberty issues and has filed previous *amicus* briefs in cases involving the public acknowledgment of God. The NCC believes that the original meaning of the First Amendment's guarantee of free speech has been distorted by the courts. NCC is interested in the present case because the ruling of the court below jeopardizes the right of municipalities to determine for themselves whether they wish to display expressions of religious faith free from threats of nullification or intimidation.

Faith and Action in the Nation's Capital

Amicus curiae Faith and Action in the Nation's Capital (FAA) is a non-profit Christian ministry whose mission is to bring the truths of sacred scripture to bear on the hearts and minds of our nation's public policy makers. Through a variety of media, FAA confronts government leaders with the powerful claims of the Gospel and with reminders of the prominent role the Bible played in the creation of our nation and its laws.

Faith and Action has an interest in this case because one of its core values is the vital role public acknowledgments of God have played throughout American history. FAA believes that the Ten Commandments formed the basic tenets of our free society and calls on public servants to heed our founders' warning that the magnificent system of governance they created cannot work without the durable bedrock of Biblical morality. Consequently, FAA does not believe the First Amendment's Free Speech Clause should be twisted to suggest that communities have no say in the values they publicly articulate and deem essential to their preservation.

SUMMARY OF ARGUMENT

The text is paramount in constitutional interpretation. Properly interpreting the text requires reading it with an eye toward what it meant by common understanding at the time of its enactment. This entails placing the text in its historical context. It is especially important to carry out this method of interpretation where the Free Speech Clause is concerned because the right to "the freedom of speech, or of the press" is so central to proper governance under the Constitution.

The Free Speech Clause refers to "*the* freedom of speech" because it addresses a particular right to express a particular kind of speech. This Court has expanded the right to include notions never intended to receive constitutional protection, to the detriment of its own jurisprudence and the country at large. The Free Speech Clause simply protects a right to speak and write on political subjects. Recovering this original understanding of the clause in this case will

solve the problem with which Petitioner is rightfully concerned and provide much-needed anchoring for an area of law that long ago drifted into chaotic waters.

The court of appeals below ignored the original understanding of the Free Speech Clause and consequently incorrectly concluded that the clause requires Pleasant Grove City to accept the "Seven Aphorisms" monument after it accepted the Ten Commandments monument. This Court should reverse the confused and dangerous decision of the court below.

ARGUMENT

> *"As this Court has previously observed, the First Amendment was not originally understood to permit all sorts of speech . . . ."*

Morse v. Frederick, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF PLEASANT GROVE CITY'S DECISION NOT TO ALLOW THE DISPLAY OF THE SUMMUM "SEVEN APHORISMS" MONUMENT IN THE CITY PARK SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE FREE SPEECH CLAUSE.

In order to correctly handle the conundrum this case presents regarding monuments on public property in the context of the Free Speech Clause of the First Amendment, it behooves this Court to avoid the seemingly innumerable tests and categories it has invented to decide free speech cases. The opinions

below readily illustrate the mess of free speech jurisprudence, as the district court and members of the Tenth Circuit Court of Appeals offered no less than four different ways of arriving at a result under this Court's "forum analysis" test for speech on government property. *See Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007); *Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007). Indeed, as the Tenth Circuit explained in a previous case involving a "Seven Aphorisms" monument, to determine the constitutionality of speech on government property a court goes through at least three steps: (1) Whether the speech falls into the category of protected speech; (2) The relevant forum in which the speech takes place; and (3) the relevant standard of Free Speech Clause review. *See Summum v. City of Ogden*, 297 F.3d 995, 1001-02 (10th Cir. 2002). The Tenth Circuit emphasized that making these determinations requires a "nuanced approach," which is to say, it is anything but clear how these tests should be applied to the particular facts of a case. *Id.* at 1001.

But these steps of analysis do not even scratch the surface of the free speech universe, as there are also tests for classifying speech as obscene,[2] fighting words,[3] or imminent lawless action,[4] for viewpoint

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[2] *See, e.g., United States v. Williams*, 128 S. Ct. 1830 (2008); *Roth v. United States*, 354 U.S. 476 (1957).

[3] *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[4] *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969).

discrimination,[5] coerced expression,[6] symbolic speech,[7] and free speech in public employment.[8] With so many "nuance[s]," it is certainly not surprising that the judges of the Tenth Circuit were torn over how to decide this case, or that other circuits have arrived at different conclusions in cases involving requests for displays on public property. *See, e.g., Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989) (rejecting a suit to compel display of a menorah in a public park); *Lubavitch Chabad House v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990) (rejecting a suit to compel display of a menorah in an airport).

There is a simpler, more responsible method of arriving at the correct conclusion in this case and all cases potentially implicating the right of free speech, a method espoused by none other than James Madison—the man affectionately known as "the father of the Constitution" and who introduced in Congress the first draft of what became the Bill of Rights. Madison once wrote that, "As a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from *the text itself*." J. Madison, Letter to Thomas Ritchie, September 15, 1821, in 3 *Letters and*

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[5] *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

[6] *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[7] *See, e.g., Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *Texas v. Johnson*, 491 U.S. 397 (1989); *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

[8] *See, e.g., Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Educ. of Will County, Ill.*, 391 U.S. 563 (1968).

Other Writings of James Madison, at 228 (Philip R. Fendall, ed., 1865). This is almost axiomatic when dealing with any legal instrument, but especially with a written constitution. "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). A textual reading of the Constitution, Madison said, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), in *Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

Supreme Court Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

It is important to pay attention to the *nuances of the text* because, as the great Chief Justice John Marshall once observed, "In a solemn instrument, as is a constitution, words are well weighed and considered before they are adopted. A remarkable diversity of

expression is not used, unless it be designed to manifest a difference of intention." John Marshall, *Report of the Minority on the Virginia Resolutions* (Jan. 22, 1799), *reprinted in* 5 *The Founders' Constitution* 138 (Phillip Kurland & Ralph Lerner eds., 1987). Once upon a time, this Court agreed with the necessity of emphasizing the text in constitutional interpretation. "In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

The present case cries out for the Court to again study and heed the original understanding of the Free Speech Clause. Such study reveals free speech to be a cherished yet specific tool of our constitutional republic. Returning to the historic understanding of "the freedom of speech, or of the press" at the time the amendment was debated and adopted reinforces the substance of the original right, fulfills the essence of the judicial oath,[9] and reveals that this is not, in fact, as close a case as it first appears to be.

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[9] *See* U.S. Const. art. VI, para. 3. As Chief Justice Marshall observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the very purpose of a written constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of courts . . . . Why otherwise does it direct the judges to take an oath to support it?" *Id.* at 179-80.

II. THE HISTORY BEHIND THE FREE SPEECH CLAUSE REVEALS A HEALTHY AMERICAN FEAR OF GOVERNMENT TYRANNY AND THE NEED TO HOLD PUBLIC OFFICIALS ACCOUNTABLE THROUGH THE FREE EXCHANGE OF POLITICAL INFORMATION.

A. The genesis of "the freedom of speech" in America

"Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. Those words trace their lineage to America's primary legal parent: England. The English Bill of Rights of 1689 provided, in pertinent part: "That *the freedom of speech*, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of parliament." English Bill of Rights § 9 (Dec. 16, 1689), *reprinted in* 2 *The Founders' Constitution*, at 319 (emphasis added). American government copied this idea in the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress . . . ." Articles of Confederation, art. V, para. 5 (1781), *reprinted in* 2 *The Founders' Constitution*, at 323. The Constitution continued the tradition: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const., art. I, § 6, cl. 1.

From these speech and debate clauses grew the core concept of "*the* freedom of speech": the freedom concerned speech about legislative issues. "The very word *parliament* emphasized the centrality of legislative speech and debate—a parliament (from the

French *parler*) is a speaking spot, a place where people parley." Akhil Reed Amar, *The Bill of Rights* 25 (1998). The right's expansion beyond the walls of Congress and state legislatures to the citizenry at large had more to do with the nature of the American political system than with any change in the substantive nature of the right.

The right's broader application began in the Puritan Massachusetts Bay Colony, an unsurprising development considering the democratic style of its town governments. The Massachusetts Body of Liberties protected the right of

> [e]very man whether Inhabitant or foreigner, free or not free . . . to come to any public Court, Council, or Town meeting, and either *by speech or writing* to move any lawful, seasonable, and material question, or to present any necessary motion, complaint, petition, Bill or information . . . .

Massachusetts Body of Liberties, para. 12 (1641), *reprinted in The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins* 94 (Neil H. Cogan ed., 1997) (emphasis added). Note that ownership of the right was expanded while maintaining its emphasis on legislative issues. The people's involvement in the government made it imperative to be able to speak and write freely concerning government affairs.

The focus of the right soon shifted from speech to a broader method of communicating political ideas: the printed word. The First Continental Congress sang the praises of "the freedom of the press" in *An Appeal to the Inhabitants of Quebec*, stating that its prime importance consisted in "its diffusion of liberal sentiments on the administration of Government, its

ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs." First Continental Congress, *An Appeal to the Inhabitants of Quebec* (1774), *reprinted in* 1 *American Political Writings During the Founding Era 1765-1805* 233-34 (Charles S. Hyneman & Donald S. Lutz eds., 1983). In emphasizing the value of a free press in policing the conduct of public officials, the Continental Congress raised what would be a constant theme for defenders of a free press in America.[10]

Several original state constitutions picked up on the theme and strengthened it. The Virginia Declaration of Rights, a major influence on Madison's proposed bill of rights for the federal constitution, proclaimed that "the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments." Virginia Declaration of

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[10] As Irving Brant noted, the theme arose directly from colonial observation of the British treatment of the press:

> As it was, Americans identified *re*pression with *op*pression, and recognized the British government as the instrument of both. . . . [T]he spectacle of freedom of opinion suppressed in England was always in sight, and the sight of it not only stirred sympathy, but carried a warning that linked freedom of speech, press and assembly with the rights whose infringement was carrying the people of the colonies toward independence. The actual evils in England were potential American evils that merged with the revolutionary grievances of American and built unwritten bills of rights in the minds of the people.

Irving Brant, *The Bill of Rights: Its Origins and Meaning* 193 (1965).

Rights, § 12 (1776). The language clearly indicates that the right to freedom of speech and press exists to combat government tyranny. The Massachusetts Constitution heightened the right's importance even more, declaring: "The Liberty of the Press is *essential* to the security of freedom in a State, it ought not, therefore, to be restrained in this Commonwealth." Massachusetts Constitution, art. XVI (1780) (emphasis added); *see also* New Hampshire Constitution, Part I, art. XXII (1783) ("The Liberty of the press is essential to the security of freedom in a State; it ought, therefore, to be inviolably preserved.").[11]

The Vermont Constitution combined speech and press for the first time, explaining that "the People have a Right to Freedom of Speech, and of writing and publishing their Sentiments; therefore the Freedom of the Press ought not to be restrained." Vermont Constitution, chap. 1, cl. 14 (1777). This formulation of the right illustrates that the founding generation understood the concept of "the press" differently than we do today. "When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term 'the press' to refer to the many independent printers who circulated small newspapers or published writers' pamphlets for a

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[11] The phrase "essential to the security of freedom in a State" recalls the language in the Second Amendment to the United States Constitution which talks about a citizen militia being "necessary to the security of a free state . . . ." U.S. Const. amend. II. It is no exaggeration to say that, like the right to keep and bear arms, the founding generation understood the right to the freedom of speech and of the press to be a powerful weapon against government tyranny.

fee."[12] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) (citing Bernard Bailyn & J. Hench, *The Press & the American Revolution* (1980); Leonard Levy, *Emergence of a Free Press* (1985); Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967)). This view of the press as the voice of the people—heightened by the fact that much of the written political discourse in the founding era occurred via anonymous authorship and the ubiquitous use of pen names—underscored the link between the right and the preservation of republican government.

B. The right to "the freedom of speech" in the debate on the Constitution

During the debate over the ratification of the Constitution, a common charge from those who came against the proposed new government was that it would dominate the state governments through the force of its power and be capable of tyrannizing the people. *See, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 648 (1989) (explaining that during the founding era there existed "a well-justified concern about political corruption and consequent government tyranny"). Anti-Federalists repeatedly noted that the Constitution lacked a bill of rights to protect the people from government overreaching, with the absence of any provision regarding free speech and press drawing much of the Anti-Federalist ire.

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[12] Interestingly, this view of "the press" simply as the people publishing ideas rather than as the corporate media may be returning with the Internet and the mass of e-mail and web pages the technology has produced.

For example, an anonymous writer calling himself "An Officer of the Late Army" responded to a speech by James Wilson defending the Constitution by observing that "Congress being possessed of these immense powers, the liberties of the states and of the people are not secured by a bill or Declaration of Rights." "An Officer of the Late Army," *Independent Gazetteer* (Nov. 6, 1787), *reprinted in* 1 *The Debate on the Constitution: Federalist and Anti-Federalist Speeches, Articles, and Letters During the Struggle Over Ratification* 98 (Bernard Bailyn ed., 1993). One of his specific concerns was that "[t]he liberty of the press is not secured, and the powers of congress are fully adequate to its destruction." George Bryan, writing as "An Old Whig" to his fellow citizens in Pennsylvania, explained this fear in more detail:

> Congress will be the great and only medium of communication from one state to another. . . . The cause of liberty, if it be not forgotten, will be forgotten forever.—Even the press which has so long been employed in the cause of liberty, and to which perhaps the greatest part of the liberty which exists in the world is owing at this moment, the press may possibly be restrained of its freedom, and children may possible not be suffered to enjoy this most invaluable blessing of *a free communication of each other's sentiments on political subjects*—Such at least appear to be some men's fears, and I cannot find in the proposed constitution any thing expressly calculated to obviate these fears; so that they may or may not be realized according to the principles and dispositions of the men who may happen to govern us hereafter.

"An Old Whig" I, *Independent Gazetteer* (Oct. 12, 1787), *reprinted in* 1 *The Debate on the Constitution*, at 124 (emphasis added). The Anti-Federalists deemed unmolested speaking and writing on political subjects to be indispensable to restraining the power of the federal government.

The Federalists did not disagree with this notion, but took the view that a bill of rights was unnecessary because the Constitution granted Congress only enumerated powers, and power over speech and press (as those terms were understood) was not listed among them. Alexander Hamilton addressed the issue head-on in *Federalist 84*, asking, "[W]hy declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" *The Federalist No. 84* (Alexander Hamilton), at 445 (George W. Carey & James McClellan eds., 2001). Federalists even attempted to argue that the right could not be sufficiently defined and so it should not be listed in the Constitution. Noah Webster, under the pen name "America," contended,

> [W]hat is this liberty of the Press? Is it an unlimited license to publish *anything* and *every thing* with impunity? If so, the author and printer of any treatise, however obscene and blasphemous, will be screened from punishment. . . . Would not that indefinite expression, *the liberty of the Press*, extend to the justification of every *possible publication*?

Noah Webster, "Reply to the Pennsylvania Minority: 'America,'" *Daily Advertiser* (Dec. 31, 1787), *reprinted in* 1 *The Debate on the Constitution*, at 555-56.

But the people resoundingly rejected the notion that the right was insufficiently defined or that adequate protection already existed in the Constitution for this right and others. The people felt that such a right was too vital for republican government be left to implication.[13] As a result, several of the state ratifying conventions sent proposals to Congress that included suggested language for protecting free speech and the press. Many of these proposals copied state constitution themes and language, believing those phrases to be well-understood while stressing that the right was even more important at the federal level because of

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[13] Thomas Jefferson expressed the people's thoughts on the subject with his usual eloquence:

> The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. *The basis of our governments being the opinion of the people, the very first object should be to keep that right*; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.

Thomas Jefferson, Letter to Edward Carrington (Jan. 16, 1787), *reprinted in* 5 *The Founders' Constitution*, at 122 (emphasis added).

the federal government's youth and distance from the direct influence of the people.

Like the Vermont Constitution, the proposal of the minority in the Pennsylvania Ratifying Convention grouped speech and writing under "the freedom of the press": "[T]he people have a right to the freedom of speech, of writing, and of publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States." Proposal of the Minority of the Pennsylvania Ratifying Convention (Dec. 12, 1787), *reprinted in The Complete Bill of Rights*, at 93. The Maryland Ratifying Convention's proposed wording employed similar language, but it explicated in more detail the kind of speech and writing deserving protection: "[T]he people have a right to freedom of speech, of writing and publishing their sentiments, and therefore . . . the freedom of the press ought not be restrained, and the printing presses ought to be free *to examine the proceedings of government, and the conduct of its officers*." Maryland Ratifying Convention Proposal (April 29, 1788), *reprinted in 2 The Debate on the Constitution*, at 555. The Virginia Ratifying Convention agreed that speaking and writing could fall under the same heading of "the freedom of the press," but emphasized yet again the right's importance in maintaining a free republican government: "That the people have a right to freedom of speech, and of writing and publishing their Sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated." Virginia Ratifying Convention Proposal (June 27, 1788), *reprinted in The Complete Bill of Rights*, at 93; *see also*, North Carolina Ratifying

Convention Proposal (August 1, 1788), *reprinted in The Complete Bill of Rights*, at 93.

C. Drafting the Free Speech Clause

This background of English and colonial history, state constitutional provisions, Anti-Federalist angst, and suggestions from state ratifying conventions shaped both James Madison's proposal for a free speech provision in the Constitution and the debate which produced the final wording of the First Amendment's Free Speech Clause.[14] Madison hoped that his proposals would "render [the Constitution] as acceptable to the whole of the people of the United States, as it has been found acceptable to a majority of them," so he was well aware of the document's perceived shortcomings. J. Madison, Speech on the floor of the House of Representatives regarding Amendments to the Constitution (June 8, 1789), *reprinted in* 5 *The Founders' Constitution*, at 24. He viewed the amendments as a chance to prove that supporters of the Constitution "were as sincerely devoted to liberty and Republican Government" as those who opposed the document's ratification. *Id.* The Free Speech Clause existed to promote these two pillars of American government: liberty and republicanism. The people's right to freely

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[14] Indeed, after Madison introduced his proposed amendments, Fisher Ames recounted to a friend, "Mr. Madison has introduced his long expected Amendments. They are the fruit of much labour and research. He has hunted up all the grievances and complaints of newspapers—all the articles of Conventions and the small talk of their debates. It contains a Bill of Rights . . . ." Fisher Ames, Letter to Thomas Dwight (June 11, 1789), *reprinted in The Complete Bill of Rights*, at 117.

communicate and disseminate information about political issues enabled the people to hold public officials accountable for their actions, preventing overreaching by government, which thereby preserved liberty.

Madison's free speech proposal provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." *Id.* at 25. Careful examination of the distinguished Virginia congressman's proposal reveals it to be heavily influenced by the free press provision in the Virginia Declaration of Rights and the proposal of the Virginia Ratifying Convention. In comparison to those provisions, Madison strengthened the wording so that the provision would provide protection of the right rather than serve as a mere declaratory statement, while he maintained the focus on the people's liberty vis-à-vis the government.[15]

Georgia Congressman James Jackson immediately responded to Madison's proposals with skepticism. In particular, he questioned the need for an amendment regarding free speech because

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[15] Notably, Madison wanted to insert this amendment—as well as his versions of what became the Second, Third, Fourth, Fifth, Sixth, and Eighth amendments—"in article I, Section 9, between clauses 3 and 4" of the Constitution, that is, immediately after the guarantee of the writ of habeas corpus and the prohibitions on bills of attainder and *ex post facto* laws. *Id.* at 25. These represent the few individual rights provisions in the body of the Constitution. *See* U.S. Const. art. I, § 9. Madison believed that his free speech proposal was similar enough in kind to these individual rights provisions to propose listing it with them.

> [t]here is no power given to congress to regulate this subject as they can commerce, or peace, or war. Has any transactions taken place to make us suppose such an amendment necessary? An honorable gentleman, a member of this house, has been attacked in the public newspapers, on account of sentiments delivered on this floor. Have congress taken any notice of it? Have they ordered the writer before them, even for a breach of privilege, altho' the constitution provides that a member shall not be questioned in any place for any speech or debate in the house? No, these things are suffered to public view, and held up to the inspection of the world. These are principles which will always prevail; I am not afraid, nor are other members I believe, our conduct should meet the severest scrutiny.

James Jackson, Debate in the House of Representatives on the Proposed Bill of Rights (June 8, 1789), *reprinted in The Complete Bill of Rights*, at 96-97.

Jackson's response reinforces the common understanding at the time concerning free speech. First, he repeated the standard Federalist argument that amendments were not necessary because the enumerated powers of Congress do not provide for any power over "the freedom of speech, or of the press." Such an argument means either that Congress literally could not pass any laws on any kind of speech, or that "the freedom of speech" had a specific, limited meaning. Second, Jackson tied "the freedom of speech" directly to its antecedent in the Constitution, the Speech and Debate Clause. Third, Jackson clearly

understood this freedom to concern the conduct of public officials.

After the initial debate, the House submitted Madison's proposals to a committee. The committee reworked the free speech provision as follows: "The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed." House of Representatives Committee of Eleven Report (July 28, 1789), *reprinted in The Complete Bill of Rights*, at 84. By combining the freedom of speech and press with the rights of assembly and petitioning the government, the committee emphasized the political nature of the right to "the freedom of speech, and of the press."

A subsequent motion in the Senate altered the text to read: "That Congress shall make no law, abridging the freedom of speech, or of the press, or the right of the People peaceably to assemble and consult for their common good, and to petition the Government for a redress of grievances." Motion in the United States Senate (Sept. 4, 1789), *reprinted in The Complete Bill of Rights*, at 86. The addition of "Congress" as the subject of the amendment constituted a subtle yet profound change in the amendment. It strengthened the prohibitions and made Congress the party responsible for violations of these rights and redress of grievances against the federal government. It represented still another indication that the freedom of speech concerned discussion of legislative acts and the behavior of public officials. It illustrated that the primary reason for the Bill of Rights was the people's fear of a tyrannical federal government.

Interpretation of the Free Speech Clause often overlooks the fact that it was meant primarily to be a tool against government oppression of the people. Madison observed in *Federalist 51* that, "It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part." *The Federalist No. 51*, at 270 (James Madison). In modern free speech jurisprudence, judges erroneously focus on the second part of Madison's diagnosis—oppression of a minority by the majority—while ignoring the first, and what was for the founding generation the foremost, problem—oppression of the people by the government. "To begin to see this, we need only reflect on the amendment's first word. *Congress* was restrained, but not state legislatures. Yet, as Madison's *Federalist No. 10* reminds us, the danger of majority oppression of minorities . . . was far greater at the state than at the national level." Amar, *The Bill of Rights*, at 21. This inversion of principles has created judicial conundrums (like the present case) concerning how far free speech protection extends which the courts were never supposed to decide.

On September 9, 1789, the Senate voted to join the religion clauses with the speech, press, assembly, and petition clauses to form one amendment: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of Religion; or abridging the freedom of Speech, or the press, or the right of the People peaceably to assemble, and to petition the government for the redress of grievances." Further Senate Consideration on Motion to amend article the third (Sept. 9, 1789), *reprinted in*

The Complete Bill of Rights, at 86. The wording of the Free Speech Clause remained unchanged until the amendment's approval by Congress on September 25, 1789. *See The Complete Bill of Rights*, at 92.

D. Contemporaneous legal commentary

Though debates about the meaning of the Free Speech Clause arose after its adoption, those debates did not call into question the kind of speech protected by "the freedom of speech, or of the press." Instead, debate swirled around whether the amendment simply enacted the common law version of the freedom of the press, which required that there be "no previous restraints on publications," or provided protection after publication as well, including protection for libel and slander.[16] Nearly everyone assumed that protected speech concerned the discussion of political issues.

In discussing the libel issue, the most famous former publisher in America, Benjamin Franklin, remarked that,

> If by the Liberty of the Press were understood merely *the liberty of discussing the propriety of public measures and political opinions*, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming

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[16] *See, e.g.*, William Blackstone, 5 *Commentaries on the Laws of England* 150-53 (U. Chi. Facsimile Ed. 1979) (1765); James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 1, 1787), *reprinted in* 5 *The Founders' Constitution*, at 122; St. George Tucker, *View of the Constitution of the United States with Other Selected Writings* 37 (Liberty Fund Ed. 1999) (1803).

> one another, I, for my part, own myself willing to part with my Share of it . . . .

Benjamin Franklin, *An Account of the Supremest Court of the Judicature in Pennsylvania, viz., The Court of the Press* (Sept. 12, 1789), *reprinted in* 5 *The Founders' Constitution*, at 130 (emphasis added). Noted constitutional law scholar of the era St. George Tucker wrote in an essay accompanying his American edition of *Blackstone's Commentaries* that, "Every individual, certainly, has a right to speak, or publish, his *sentiments on the measures of government*: to do this without restraint, control, or fear of punishment for so doing, is that which constitutes the genuine freedom of the press." St. George Tucker, "Of the Right of Conscience; and of the Freedom of Speech and of the Press," in *View of the Constitution of the United States with Other Selected Writings* 393 (Liberty Fund ed. 1999) (1803) (emphasis added).

In 1804, Alexander Hamilton argued as an attorney in a case concerning what constituted the freedom of the press. His argument confirmed both the common understanding of the right and its importance to free republican government: "The liberty of the press consists in publishing, with impunity, truth, with good motives, and for justifiable ends, though *reflecting on government, magistracy, or individuals*. . . . [T]he allowance of this right is essential to the preservation of a free government; the disallowance of it fatal." Alexander Hamilton, quoted in *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804), *reprinted in* 5 *The Founders' Constitution*, at 162. Renowned Pennsylvania attorney William Rawle confirmed this notion of the meaning and importance of "the freedom of speech" in his treatise on

constitutional law: "The foundation of a free government begins to be undermined when *freedom of speech on political subjects* is restrained; it is destroyed when freedom of speech is wholly denied." William Rawle, *A View of the Constitution of the United States* 119 (1825) (emphasis added).

In his famous *Commentaries on the Constitution*, Justice Story echoed these pronouncements:

> No one can doubt the importance, in a free government, of *a right to canvass the acts of public men, and the tendency of public measures, to censure boldly the conduct of rulers, and to scrutinize closely the policy, and plans of the government.* This is the great security of a free government. If we would preserve it, public opinion must be enlightened; political vigilance must be inculcated; free, but not licentious, discussion must be encouraged.

Joseph Story, 3 *Commentaries on the Constitution* § 1882 (1833), *reprinted in* 5 *The Founders' Constitution*, at 182 (emphasis added). Over half a century later, Judge Thomas Cooley in his *Constitutional Limitations* wrote that in ratifying the free speech and free press clauses, the founding generation intended to prevent "not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general *discussion of public matters* as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." Thomas Cooley 2 *A Treatise on Constitutional Limitations* 604 (7th ed. 1903) (emphasis added). Yet again the right was tied directly to preventing government oppression and

aiding the people's involvement in the republican government.

E. The Sedition Act debate

While legislative history and contemporaneous legal commentaries provide extensive evidence of the purpose and meaning of the free speech and free press clauses, a political firestorm which arose a mere seven years after the ratification of the Bill of Rights provided the first test of its boundaries. Enacted in 1798 by the Federalist-controlled Congress and signed into law by President John Adams, the Sedition Act of 1798 permitted fines or imprisonment "if any person shall write, print, utter, or publish . . . any false, scandalous and malicious writing" against members of Congress or the President or "bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Sedition Act (July 14, 1798), *reprinted in* 1 *Documents of American History to 1898* 177-78 (Henry S. Commanger ed., 1973). The debate that ensued over the constitutionality of the act demonstrated that the Free Speech Clause concerned a right to freely discuss legislative issues and the behavior of public officials regarding those issues.

James Madison succinctly summarized the constitutional problem with the Sedition Act in the Virginia Resolutions, stating that it exercised

> a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto,—a power which, more than any other, ought to produce universal alarm, because it is *leveled against the right of*

> *freely examining public characters and measures, and of free communication among the people thereon*, which has ever been justly deemed the only effectual guardian of every other right.

J. Madison, *The Virginia Resolutions* (Dec. 21, 1798), *reprinted in* 5 *The Founders' Constitution*, at 136 (emphasis added). Given the historical discussion above, it is obvious that this passage references the free speech and free press clauses, and that there was no question in Madison's mind or by the understanding of the Virginia Assembly that those clauses existed to protect the right of the people to discuss "public characters and measures." In his report on the Virginia Resolutions, Madison provided further explication of the point:

> [I]t is manifestly impossible to punish the intent to bring those who administer the Government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; because those who engage in such discussions must expect and intend to excite these unfavorable sentiments, so far as they may be thought to be deserved.

J. Madison, Report on the Virginia Resolutions (Jan. 1820), *reprinted in* 5 *The Founders' Constitution*, at 145.

Proponents of the Sedition Act responded to the Virginia and Kentucky Resolutions by relying on the previously mentioned common law rule of "no previous restraint" on the freedom of the press. They argued that because the Sedition Act did not require a license to print material against members of Congress or the President, it did not violate the First Amendment.

Madison answered this argument by contending that the First Amendment expanded the right of free speech beyond the common law understanding. He explained that this expansion followed from the differences between the English and American systems of government.

> In the British Government the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. . . . In the United States the case is altogether different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws.
>
> . . . .
>
> The nature of governments elective, limited, and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion than might be tolerated by the genius of such a government as that of Great Britain. In the latter, it is a maxim that the King, an hereditary, not a responsible magistrate, can do no wrong, and the Legislature, which in two-thirds of its composition is also hereditary, not responsible, can do what it pleases. In the United States the executive magistrates are not held to be infallible, nor the Legislatures to be omnipotent;

> and both being elective, are both responsible. Is it not natural and necessary, under such different circumstances, that a different degree of freedom in the use of the press should be contemplated?
>
> . . . .
>
> In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands.

Id. at 142.

Whether the First Amendment adopted merely the common law scope of free speech and free press or something larger is immaterial to the issue in this case, but Madison's explanation for the purpose the right serves in this country is extraordinarily relevant to the proper meaning of the right. The Virginia Resolutions proclaimed that free speech "has ever been justly deemed the only effectual guardian of every other right" because it polices the actions of the people's representatives in government. As Madison so carefully explained, the Constitution did not create a monarchy, a unitary executive or legislative government, or a government in which the actions of any government officials are deemed unchallengeable or infallible. Public servants are electable and accountable to "the People," who "possess absolute sovereignty." Consequently, the right to "canvass[] the merits and measures of public men" and communicate those findings to others is essential to sustaining free

republican government. This is the right protected by "the freedom of speech, or of the press."[17]

III. THE FREE SPEECH CLAUSE DOES NOT REQUIRE PLEASANT GROVE CITY TO DISPLAY THE SUMMUM "SEVEN APHORISMS" MONUMENT IN THE CITY PARK BECAUSE THE MONUMENT DOES NOT CONSTITUTE POLITICAL SPEECH.

The foregoing history demonstrates that "the freedom of speech, or of the press" protects the discussion of public measures and public men. In the past, this Court has agreed with that conclusion:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Mills v Alabama, 384 U.S. 214, 218-219 (1966); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964).

Preserving the free discussion of governmental affairs is not just "a major purpose" of the Free Speech

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[17] This Court expressed agreement with this understanding when it commented that there is "a broad consensus that the [Sedition] Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

Clause; it is its *only* purpose. The freedom to speak on any subject, including one's religious beliefs, may seem desirable in a free society, [18] but it is not a right protected under the Free Speech Clause. The speech protected by that clause relates to government action with the goal of keeping the government's powers within the boundaries defined by the Constitution. It is speech that enables the people in a republican government to vote in an intelligent manner on public measures and their representatives in office. Other kinds of speech certainly have value in a free society, but they do not fall under the protection of the Free Speech Clause.

The mistake this Court has made lies with expanding the right beyond its intended scope, thereby requiring multiple layers of analysis to categorize various kinds of speech as worthy or unworthy of protection based on a seemingly endless litany of criteria. Holding to the original meaning of the Free Speech Clause simplifies the analysis while maintaining rigorous protection for speech that is truly essential to republican government.

This case involves Pleasant Grove City's refusal to permit the erection of a monument containing the "Seven Aphorisms" of Summum. The aphorisms purport to be "principles underlying Creation and all of nature." *The Aphorisms of Summum and the Ten Commandments*, http://www.summum.us/philosophy/

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[18] Such a broad right, however, raises the inevitable problem this Court has encountered in determining where to draw the lines between protected and unprotected speech since virtually everyone grants that there must be *some* limits on speech in a *civil* society.

tencommandments.shtml (last visited June 18, 2008). The content of this monument has absolutely no relation to public measures or the behavior of public officials related to those measures. It does not communicate any information about the actions of federal, state, or local officials pertaining to proposals, policies, ordinances, laws, and the like. It does not aid the people in holding public officials accountable for their public actions which affect the rights of the people. Therefore, the speech expressed on the monument is not protected by "the freedom of speech, or of the press" embodied in the First Amendment.

Because the monument does not embody the kind of speech protected by the First Amendment's Free Speech Clause, Pleasant Grove City is not constrained by this portion of the Constitution in choosing whether to accept or reject the monument for public display. This conclusion makes no judgment on the general ability of Respondents to spread their message or the wisdom of Pleasant Grove's decision not to accept the monument. It simply follows the language of the First Amendment as it was originally understood at the time of its adoption. Expanding the concept of "the freedom of speech" beyond this meaning takes the Court outside its sworn authority under the Constitution and into a thicket from which no logical or coherent rule is bound to emerge.

CONCLUSION

For the reasons stated, this Honorable Court should reverse the decision of the Tenth Circuit Court of Appeals and affirm that Pleasant Grove's decision to refuse the erection of the Summum "Seven Aphorisms" monument in a public park does not implicate the Free Speech Clause of the First Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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PLEASANT GROVE CITY, *et al.*,
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v.

SUMMUM, a corporate sole and church,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS* [1]

The International Municipal Lawyers Association (IMLA), previously known as the National Institute

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this *amicus curiae* brief by filing consents to all *amicus* briefs with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, the *amicus* states that no counsel for a party has authored this brief, in whole or in part, and no person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

of Municipal Law Officers, is a non-profit, professional organization of over 2500 local government attorneys, most of whom serve as corporate counsel for municipalities in the United States. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the development of municipal law, including by advocating the nationwide views of local government on legal issues. IMLA has appeared as a friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA submits this brief to provide the Court with broad and detailed information about how municipalities interact with monuments in their public parks. The organization has surveyed its membership on their lived experience with municipal acceptance and display of privately-donated monuments, including selection procedures, content control, ownership, public participation, and counter-speech. Appendixes A-D sets forth the procedures used, the questions asked, and summaries of the responses. They provide vivid illustrations of municipal governments' expression of local culture through privately-donated monuments in city parks. This *amicus* brief explains the importance to its members of this Court's recognition that municipal display of all monuments, including those originated or funded by private donors, be recognized as government speech.

SUMMARY OF THE ARGUMENT

When a municipality accepts, owns, and installs a monument in a public park, that monument is

government speech, regardless of who originally conceived or funded the project. This conclusion flows from the two types of government speech recognized by this Court: discretionary speech selection and expressive government policy. Municipalities edit the physical landscape and convey broad themes of local character through their decisions on placing monuments on public lands. Citizens participate in all aspects of the process and hold their local government responsible for its decisions.

In addition, municipal monument display is government speech under the four-factor test developed in the Circuits. The Municipal Practice Examples gathered by IMLA show that (1) municipalities' central purpose in accepting and displaying monuments is community expression; (2) city governments frequently exercise editorial control through requiring prior submission, design input, modification of words and images, and legislative approval of specific content, and they retain ongoing editorial discretion; (3) municipalities become the literal speaker upon accepting and installing a monument in a park, and the public recognizes this; and (4) ultimate responsibility for the monuments rests with municipalities, based on their ownership and control.

If the display of privately-donated monuments in municipal parks automatically creates a public forum for monuments, city residents lose. Their representatives lose all ability to shape municipal green space to reflect local tastes, values, and culture. Public forum analysis leaves cities with nothing but the crowd control tools suitable for public assemblies. The choice is to accept all offerings on a first-in-time or quota basis, or shut down the unintentional "forum," uprooting longtime landmarks. The Municipal Prac-

tice Examples document the rich array of community expression that is at risk unless such monuments are recognized as government speech.

Limited public forum analysis does not provide an alternative; it is unworkable in this context and contrary to government's expressive purpose. Where proposed criteria are inherently subjective, such as "relates to local history," any choice of which version of history to commemorate in permanent monuments necessarily includes viewpoint. In addition, the sporadic occurrence of large monument installations, which frequently spans multiple administrations and even generations, clashes with the doctrinal assumptions of the limited public forum.

Recognizing that government expresses its own viewpoint in monument selection, however, does not mean that there are no limits on what a government may say through permanent monuments in public parks. Indeed, one benefit to recognizing such monuments as government speech is that – in contrast to private speakers in a public forum – government is both (i) more likely to self-regulate by appealing to the broad spectrum of its relevant community and (ii) subject to some restraints. The Establishment Clause constrains all government speech. There are also well-grounded constitutional arguments for limits on government action based solely on animus.

Finally, recognizing government speech here is particularly appealing because this is not a context where there is any possibility of government's expression silencing, or even negatively impacting, private speech. As the Municipal Practice Examples document, the public forum context (parks) means that private speech – including speech contrary to the monuments' express or implied messages – is allowed.

As it turns out, government speech symbolized by monuments actually provides a focal point for large-scale private speech, such as anti-war protests. In sum, allowing municipalities to accept donated monuments that reflect community values is an important, well-grounded and logical next step in developing the line between government speech and forum analysis.

ARGUMENT

I. IMLA'S MUNICIPAL PRACTICE EXAMPLES SHOW THAT APPLYING PUBLIC FORUM DOCTRINE TO DONATED MONUMENTS WILL INTERFERE WITH EXPRESSION OF LOCAL CULTURE

City parks are open to all for a broad range of public uses, including public assembly. These valued green spaces, including any permanent monuments located there, are owned and maintained by public entities. No reasonable person would assert the right to bring in a bull-dozer, dig up the earth, and erect a large stone monument on his own initiative, without first inquiring as to the procedures and seeking governmental approval. Where monuments do exist in city parks – whether war memorials, testaments to bygone leaders, commemorations of current heroes or issues, or large abstract sculptures – it is because the city's government has agreed to their installation.[2]

Consequently, the nature and content of all monuments in city parks communicate messages about the particular community. Regardless of the original

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[2] This brief will use the terms "city" and "municipality" throughout, but its analysis applies equally where the park land is owned by park districts and any other form of local government, such as villages.

source, monuments indicate what the city, through its elected representatives, has valued in terms of heroes, history, and culture. *See* SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 90 (Duke Univ. Press 1998)(noting that "it is not at all unusual for private individuals or groups to finance monuments," such as many found throughout New York City's Central Park, and that "their display in a particular setting [conveys] the state's special imprimatur for the message contained within the monument").

The Municipal Practice Examples (MPE) collected by IMLA (described further in Appendixes A-D) offer this Court a broad set of illustrations of the uniquely local character of many privately-donated monuments; a few samples are described here. Some statues reflect a type of individual admired by the community (e.g., Walter Reuther, international labor organizer, born in the city (Wheeling, West Virginia, #27), John A. Roebling, founder of Roebling Steel, the town's main business (#10), Robert Ridgway, author, artist, scientist, founder of Bird Haven (Olney, Illinois, #139)). Others document a particular slice or version of local history (e.g., Pony Express monument (Benicia, California, #115), statue of Fathers Dominguez and Escalante, first European explorers of area, and monument to city's large Icelandic population (Spanish Fork, Utah, #188), local Native American Chief Niwot and mining history statue (Boulder, Colorado, #197), Hartford Circus fire memorial (Hartford, Connecticut, #198)). And some monument decisions express specific ways to honor our nation's conflicts (e.g., Hmong-American Vietnam War Memorial (Sheboygan, Wisconsin, #28), monuments to local war heroes (Fredricksburg, Texas, #78), and a large bronze statue displaying the word

"peace" in many world languages (Fayetteville, Arkansas, #211)).[3]

The Tenth Circuit erred by drawing an artificial distinction between "private" and "public" monuments because, as the MPE and other examples show, that is not how municipalities operate. Instead, the two sectors often blend roles in a seamless partnership. Under the court's approach, if a city commissions and pays for a statue, that may be government speech, but the same statue donated through a private organization's initiative is private speech. *See Summum v. Pleasant Grove City*, 499 F.3d 1170, 1180 (10th Cir. 2007)(Tacha, J.)(response to dissent from denial of rehearing *en banc*).

Narrative responses from the MPE tell a different story. For example, in Kansas City, Missouri (#117), "[o]ften the projects. . . result from informal discussions among the leaders of the community and representatives of the City. It is often hard to determine who made the 'first move.'" And, "[w]e make every effort to work with community groups who propose appropriate fountains, artwork, or other similar items. We are almost never made a 'take it or leave it' offer. . . ." Similarly, in Cedar City, Utah (#60), where the city has "accepted private money" for statues of the City's founders and "to construct memorials for soldiers in Iraq, Korea, and Vietnam," the respondent commented that "there has been a cooperative effort between the Mayor's Office and private citizens groups."

Two publicized examples of specific donations give more detail. First, even commissioned public monu-

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[3] Additional examples of monuments reflecting specific local issues and viewpoints are found in App. D.

ments often are funded through private donations, and large benefactors participate in selecting the content and creator of the monuments. For example, the City of Chicago's unique Crown Fountain, opened 2004 in the new Millennium Park, was funded by the Crown family. Following an invited competition, the private patron, City officials, and a public-private planning committee together selected its creator, Spanish sculptor Jaume Plensa, a leading contemporary artist. The new landmark consists of two 50' high towers that display changing video images of photographed faces, book-ending a water-filled area used for play and interaction. The donors and City personnel worked together over a several-year period on the implementation details, including previewing a mock-up of the structure and providing input and limitations on the content displayed. TIMOTHY GUILFOYLE, MILLENNIUM PARK: CREATING A CHICAGO LANDMARK (Univ. of Chicago Press 2006); http://www.millenniumpark.org/artandarchitecture/crown_fountain.html.[4]

Second, when a private donor presents an existing monument as a proposed gift to a municipality, its display on public land requires a governmental decision and, often, the use of public funds. For example, in Lake Geneva, Wisconsin, a resort town close to Chicago, philanthropist Richard Driehaus donated a grand neoclassical fountain, a replica of one installed in New York's Central Park in 1873. Originally purchased for his own estate, Mr. Driehaus offered the fountain as a town centerpiece, stating that it celebrates Lake Geneva's illustrious past and historic

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[4] Note: This information was confirmed by telephone conversation with Ed Uhlir, Project Director of Millennium Park, June 17, 2008.

lake-front estates. The city council approved acceptance of the gift and committed $40,000 for its installation in a central location. *Fund-raiser will help enhance area*, http://www.lakegenevanews.net, June 24, 2004.

These counterpoints also show how monuments convey thematic government messages, even where the donations are public art, rather than text or an historical figure. The Crown Fountain successfully sends its intended message: Chicago is cutting-edge, a world-class city, a leader in the arts. The Driehaus Fountain, in contrast, expresses a quieter message of privilege and embracing history. If Lake Geneva had been offered a large contemporary monument to anchor the traditional town, or if the Crown family had proposed a Gilded Age monument for Chicago's Millennium Park, such donations likely would have been declined as inconsistent with the municipalities' identities.

If a city's display of a single donated monument, from any era, inadvertently transforms a park into a public forum for the installation of private monuments, then the community loses all voice in fashioning its permanent landmarks. When regulating speech in a public forum, cities constitutionally may employ only content-neutral regulations. *E.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, that would include safety regulations, such as those used for other types of private structures on the public way (*see, e.g.*, CITY OF CHICAGO, IL., MUN. CODE, § 10-28-750 *et seq.* (newsracks), § 10-28-800 *et seq.* (advertising benches)) and allocation rules used to distribute public space resources. For example, there is a limit to the number and location of large-scale public gatherings in municipal parks;

this Court has approved permit systems that assign such space to permit-applicants on a first-in-time basis. *Thomas v. Chicago Park District*, 534 U.S. 316, 318 (2002)(citing CHICAGO PARK DIST. CODE, ch. VII, §§ C.3.a(1), C.5.a).

As a practical matter, application of these rules, designed for public forums, would mean that city governments would be forced to accept and install all structurally-sound private monuments. Open park space is limited and highly-prized. To require a content-neutral, "first-come, first displayed," private monument policy – or no private monuments at all – would permanently destroy a valuable, longstanding form of government speech.

II. MUNICIPAL DISPLAY OF DONATED MONUMENTS IN PARKS IS GOVERNMENT SPEECH

The Tenth Circuit took an unduly restrictive view of this Court's government speech rulings when it refused to apply them to Pleasant Grove's monument, stating that the City was not acting as "librarian, television broadcaster, or arts patron." *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1052 n.4 (10th Cir. 2007). Government's role as the creator of beautiful, welcoming public parks actually makes an even stronger case for government speech because, as described below, it encompasses this Court's two lines of cases. Municipal decisions on proposed monument donations both (1) involve the curator/editor roles and (2) convey broad policy messages. *See generally* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71 (Winter 2004)(applying the developing doctrine to

analogous public-private expressive partnerships). In addition, monument display satisfies the four-factor government speech test developed by the federal circuits.

A. These Monuments Fit Within Both Types of Government Speech Recognized By This Court And Satisfy The Doctrine's Rationale

1. *The Speech Selection Is Inherently Discretionary*

A municipal decision to accept and display a privately-donated monument in a public park fits well within this Court's "speech selection" cases. Where a government's choice of which private speech to include in a public project is necessarily content-based and subjective, it has been allowed to express preferences between speakers. *Nat'l Endowment of the Arts v. Finley*, 524 U.S. 569 (1998)(in selecting recipients of federal arts funding based on "artistic merit," viewpoint neutrality not required and government permitted to consider decency and values compatibility); *Ark. Educ. Television Comm'n. v. Forbes*, 523 U.S. 666 (1998)(public broadcasters generally have substantial editorial discretion in selecting which private speech to include; selection and presentation process is government speech).

A city's decision to display a privately-donated monument includes features of both *Finley* and *Forbes*. As in *Finley*, monuments are a form of public art; they include representative statues, textual messages, and abstract sculptures with potent images. As in *Forbes*, agreeing to install a monument means allocating a portion of a limited public good – there, air time; here, open space – to a particular piece of

originally private speech. When exercising their park management function, municipalities balance many interests, editing the physical space, with an eye toward creating beauty and maximizing the public's enjoyment, consistent with the character of the town. Municipal policies that guide decisions on proposed monument donations, as referenced in the MPE responses, recognize the importance of preserving open space in making this choice. *E.g.*, CITY OF PORTLAND, OR., POLICIES AND RULES, ARB-PRK-3.01 ("Accepting Gifts and Memorials"), *available at* www.portlandon line.com.

2. *Monuments Convey the Communities' Broad Substantive Messages*

A decision on monument display also is covered by the second line of Supreme Court government speech cases: where government promulgates a substantive policy message. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005)(promoting beef consumption through advertisements funded by beef producers' tax was not unconstitutional compelled speech); *Rust v. Sullivan*, 500 U.S. 173 (1991)(promoting pro-life policy through selective funding of family planning clinics allowed).

All monuments convey ideas and values, whether stated explicitly or as broad themes.[5] The Municipal Practice Examples illustrate how governments' decisions regarding whose lives to honor in this way, and how they should be portrayed, express community

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[5] For a thorough treatise on governments' policy expressions through war monuments, *see* JAMES M. MAYO, WAR MEMORIALS AS POLITICAL LANDSCAPE (Prager Pub. 1988)(discussing symbolic messages from the perspective of an architecture and urban design professor).

ideals at the time of installation. For example, Tucson, Arizona (#235) displays a statue of Pancho Villa, a Mexican revolutionary leader who advocated for agrarian reform and the poor. Some, however, have objected to the message sent by this monument, as he is viewed by them as a violent bandit. Also, a monument's message can change over time due to cultural shifts. In Longview, Washington (#92), some now question the accuracy of a statue's portrayal of Sacajawea, the Shoshone woman who acted as a guide for Lewis and Clark.

Placement of a new monument can transform a values message sent by earlier installations. This happened in 1996, when a large bronze sculpture of tennis great Arthur Ashe joined the existing statues of five Confederate leaders on Richmond, Virginia's well-known "Monument Avenue." After several years of debate over this proposed location, which incorporated the long-standing debate over the meaning of Confederate symbols,[6] the final democratic decision was that such placement of a memorial to this modern-day Richmond hero sent a positive message of trancendence and opportunity.[7] A private organi-

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[6] For a summary of that debate, *see, e.g.*, J. MICHAEL MARTINEZ, WILLIAM D. RICHARDSON, RON MCNINCH-SU, EDS., CONFEDERATE SYMBOLS IN THE CONTEMPORARY SOUTH (U. Fla. Press 2000)(collecting multi-disciplinary essays, some against preserving symbols of racial oppression and some for preserving Southern history).

[7] *Race-tinged Furor Stalls Arthur Ashe Memorial*, www.nytimes.com, July 9, 1995. *See* LEVINSON, *supra*, at 115-19. Even more controversial was a new Abraham Lincoln monument, initiated by the U.S. Historical Society, a Richmond-based organization; the Richmond City Council passed a resolution calling the statue a "symbol of unity and reconciliation" and approved a public contribution of up to $45,000 toward the

zation, the "Virginia Heroes," spearheaded the fundraising for the Ashe monument and presented the project to Richmond's City Council. *See* http:// www. cvco.org/arts/ psculpt/ashe.

This Court has made clear that a government's broad policy message may involve private entities and still remain government speech, so long as it retains overall control. *Johanns*, 544 U.S. at 561. There, the respondent beef producers argued that tax-funded television ads ("Beef – It's What's For Dinner") were not government speech because their content was controlled by a nongovernmental entity, comprised of 50% cattle producers appointed by the Secretary of Agriculture, and 50% other industry members. *Id.* at 551. Despite a large creative role by private citizens, the *Johanns* majority concluded: "The message of the promotional campaigns is effectively controlled by the Federal Government itself." *Id.* at 560. There were two critical features. First, "the government sets the overall message to be communicated," based on a statutory federal policy of promoting beef consumption. *Id.* at 553 (citing 7 U.S.C. § 2901(b)). Second, the Secretary had final approval authority over all advertisements, which was demonstrated by: (1) prior review of ad copy by Department officials; (2) rejection or rewriting of some proposals by the Department; and (3) participation by Department personnel in open meetings at which proposals were developed. *Id.* at 561 (citations omitted).

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granite plaza at its location on nearby federal park land. Jeremy Redmon and Lindsay Kastner, *Lincoln Statue Unveiled*, TIMES-DISPATCH, April 6, 2003, *available at* http://www.stat alum.org/lincolnstatue.html.

Based on 112 examples detailed in Appendix D, municipalities around the country exercise content control over monuments through procedures that are remarkably similar to those outlined in *Johanns*. First, while less frequent because of the occasional nature of monument donation, some cities have applicable written policies setting criteria for donations of public art, park improvements, or monuments. (*E.g.*, St. Petersburg, Florida (#162)(new ordinance requires legislative consideration and approval of historical significance of any proposed monument.) Second, many municipalities require prior submission of words and graphics before any government decision on accepting a monument, and many require design input. (*E.g.*, Newport News, Virginia (#79) (written policy regarding proposed monuments for military-related actions requires city review and approval of text detailing actions of honorees prior to approval of monument.) Even without a specific policy requiring prior submission, however, the installation process itself offers city personnel at least a last-minute chance to see the monument before it is erected, and are thus to refuse any content that undermines the municipality's overall character message. Third, some questionnaire respondents provided specific examples of times where a city required modification of words or images prior to display. (*E.g.*, Tucson, Arizona (#232)("wording is sometimes modified to be sensitive to a large audience. In the case of a monument (The Mormon Battalion), [the] artist was asked to reconsider physical traits that appeared to lack sensitivity to a diverse population.")

Fourth, and perhaps most significantly, the vast majority of municipalities represented in the MPE require legislative acceptance of any privately donated monument. Thus, for these municipalities,

open meetings are required, and the specifics of the proposed monument are discussed publicly before approval by elected representatives. Given that the type of monument at issue usually conveys its symbolic content well – e.g., a monument to the Hmong role in the Vietnam War, or to local Chief Niwot – legislative approval is in almost all cases the practical equivalent of a requirement for prior submission and approval of each monument's overall message. For monuments without explicit messages, an "overall message" can be found in municipalities' promotional statements, which summarize the administration's essential vision of the community.[8]

3. *IMLA'S Examples Demonstrate Political Accountability in this Context*

Municipal display of private monuments handily complies with the underlying rationale for allowing government speech in the face of differing views. "'When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.'" *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000), *quoted in Johanns*, 544 U.S. at 574 (Souter, J., dissenting). Here, as discussed above, the elements emphasized by the *Johanns* majority, 544 U.S. at 564, are satis-

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[8] *E.g., compare* Village of Hinsdale, Illinois Home Page, http://www.villageofhinsdale.org (home page describing municipality as one of "natural beauty, hometown charm, and a friendly community atmosphere") *with* Village of Oak Park, Illinois Home Page, http://www.oak-park-us/Village_Background/Village_Background.html (web page describes municipality as "known for its architectural heritage and diverse population," followed by details on diversity).

fied based on city council involvement and administration control.[9]

Also, the donated monument context does not implicate the *Johanns* dissent's "ventriloquism" concerns. *See* 544 U.S. at 576 (Souter, J., dissenting)(few Americans would be aware that the government was behind advertisements with the tag line, "Paid for by the beef producers"). Unlike line items in a complex budget, monuments displayed in city parks cannot be hidden from public view. There is no need for a "sunshine law" to expose monuments to political commentary. (*See, e.g.*, The Freedom of Information Act, 5 U.S.C. § 5521.) Moreover, when a private organization's monument is permanently installed on public land, people naturally expect that the municipality is involved and has granted prior, express permission. *See, e.g., Graf v. City of Chicago*, 9 F.3d 1309, 1313 (7th Cir. 1993)(citing CITY OF CHICAGO MUN. CODE § 10-28-040)(discussing a typical ordinance generally prohibiting erection of structures or stationary objects on any public ground).

The Municipal Practice Examples again underscore the practical realities. As shown in Appendix C, when citizens find a monument offensive, they turn to their municipal government for redress. The letters, public protests, and lawsuits show that citizens believe that the government – and *not* the original private donor – is responsible for the objectionable state of affairs. Sometimes the municipality

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[9] Indeed, accountability is enhanced here by virtue of the closer connection between citizens and their local government, as compared with federal, or even state, governments. *Compare Hinrichs v. Speaker of the House of Reps. of the Ind. Gen. Assembly*, 506 F.3d 584, 592-93 (7th Cir. 2007)(noting distinction in Establishment Clause taxpayer standing context).

responds (e.g., Moorhead, Minnesota (#32)(in response to complaint, changed wording on private-donor-initiated "Norwegian Stave Church" display to make tone more historic and less religious), and sometimes it does not (e.g., Neenah, Wisconsin (#26)("Playing in the Rain" fountain was opposed by neighbors, but "city leaders stuck with the decision to place the fountain in the downtown park," and it is now a "beloved landmark"), but the municipal officials always are held politically accountable.

B. These Monuments Satisfy The Appellate Courts' Four-Factor Government Speech Test

In applying the relatively new government speech doctrine to expressive contexts other than government-funded programs, the appellate courts have developed a four-factor test. *See, e.g., Ariz. Life Coalition, Inc. v. Stanton,* 515 F.3d 956 (9th Cir. 2008)(message on specialty license plate was primarily private speech and thus created a limited public forum); *Wells v. City & County of Denver*, 257 F.3d 1132 (10th Cir. 2001)(sign listing corporate sponsors of city's holiday display was government speech, not forum; no First Amendment obligation to allow other private speech); *Knights of the KKK v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000) (constitutional for public radio station to reject KKK as sponsor, and thus exclude it from broadcast acknowledgement of sponsors). The four factors are: (1) the central purpose of the challenged speech; (2) the municipality's degree of editorial control; (3) the identity of the literal speaker; and (4) whether "ultimate responsibility" for the content rested with the municipality. *E.g., Stanton*, 515 F.3d at 964; *Wells*, 257 F.3d at 1140-42.

Municipal display of donated monuments meets this test, which has been most fully developed in a recent series of cases involving specialty license plates. The Tenth Circuit erred, in an earlier case, when it applied the four factors and concluded that a similar monument and context was the Eagles' private speech. *See Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002). This Part II.B. focuses primarily on explaining why the *Ogden* reasoning was based on a faulty understanding of the practical context.

1. *Their Central Purpose Is Municipal Expression*

The central purpose of a municipality in accepting and displaying a privately-donated monument is universally expressive. As documented above, municipalities seek to enhance the park's aesthetics and to express a message, whether symbolic or literal, general or specific. The Tenth Circuit in *Ogden* made two critical errors: 1) it focused on the monument's avowed purpose, to advance the views of the Eagles that the Ten Commandments provide a moral code for youth, and 2) it rejected a municipal expressive purpose because the then-mayor "had no idea as to the meaning of parts of the Monument, particularly the Phoenician letters." 297 F.3d at 1004.

First, the essential question is not what the *donors* of a monument had in mind, but rather, what was the *city*'s purpose in agreeing to display the monument. If, for example, at that time, Pleasant Grove's city council agreed with the Eagles' idea that the monument would provide a positive influence on youth, then that is the government's expressive purpose in its display.

Second, the Tenth Circuit's assumptions about city government are incorrect: it would not be common for a mayor, or even a planning commissioner, to be familiar with every symbol on a particular monument, or every theme the sculptor intended. For example, although scores of City of Chicago employees worked on all stages of the 6-year, $475,000,000 Millennium Park project, and the Mayor was very involved in the public art selection process, neither he nor many others would know specifically that the videos displayed on the Crown Fountain are from a "broad social spectrum" of 1,000 Chicago citizens, let alone that the faces are "a reference to the traditional use of gargoyles in fountains, where faces of mythological beings were sculpted with open mouths to allow water, a symbol of life, to flow out." *See* http://www.millenniumpark.org/artandarchitecture/crown_fountain.html. That practical reality does not change the administration's expressive purpose: showcasing the City as bold, modern and world-class.

Finally, a city's display of donated monuments fits this factor more closely than did the other contexts analyzed by the federal circuit courts. Because states sell specialty license plates for an additional fee, the majority of courts have characterized the state's central purpose as revenue-raising. *E.g., Stanton*, 515 F.3d at 966; *Choose Life v. White*, 2007 WL 178455 (N.D. Ill. Jan. 19, 2007). *But see ACLU v. Bresden*, 441 F.3d 370 (6th Cir. 2006)(where legislature affirmatively voted to create specialty plate for given cause, found primary purpose was government speech); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004)(found purpose mixed; held a forum). Here, the municipalities' expressive purpose is not diluted in this way. Also, the two lead cases both held the first factor satisfied by a very limited

government expressive purpose, thanking sponsors. *Wells*, 257 F.3d at 1141-42; *Univ. Mo.*, 203 F.3d at 1093. Surely this means that, not only are "thank the donor" plaques on monuments government speech, but so too, are the far grander messages in donated veterans' memorials and monuments of town founders.

2. *Municipalities Exercise Editorial Control*

As described above, municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals. (*See* Part II. A.2. and Appendix D.) In *Ogden*, the Tenth Circuit held this second factor was not met because the Eagles' monument was donated as a finished product. 297 F.3d at 1004. The relevant inquiry, however, is whether the government has the right to edit speech created by a private organization, not whether such editing was needed in a particular instance. *See Johanns*, 544 U.S. at 562.

Even if Pleasant Grove originally accepted the Eagles' monument without participating in its design and composition, municipal ownership of monuments encompasses an ongoing right to editorial control. If, for example, a city determined that one prominent symbol on an existing monument was now widely viewed as a sign for a satanic cult or warring gang, that city likely would exercise its editorial control, by modifying the statue, if possible, or removing it. Nor is this scenario far-fetched. One commentator writes of a four-sided monument in Santa Fe, New Mexico which describes fallen heroes from various conflicts, using the language of the applicable era. On one

side, the word "savage" has been carved out, unofficially. In addition, a plaque has been added that attempts to explain and excuse the use of the terms "savage" and "rebel" and expresses hope for changed attitudes. Robert Lipkin, *Down with Flags, Statues, and Monuments: Cultural Memory in a Deliberative Democracy*, 7 UNIV. CHI. L. SCH. ROUNDTABLE 239, 262-63 (2000). *See also* LEVINSON, *supra* (giving additional examples of governmental editing jobs on existing monuments). In the permanent monument context, editorial control is not necessarily fixed at one point in time.

Moreover, even if the monument was mass-produced and arrived sight unseen, a municipality could exercise editorial control over the plaque acknowledging the private donor. Imagine a sign that read, "Donated by the Eagles to Assist Metropolis in its Mission to Promulgate the Word of the One True God." Any municipal lawyer would advise her client of the unconstitutionality of such language, and the municipality likely would require a modified message as a condition of its display. *Compare Univ. Mo.*, 203 F.3d at 1094 (second factor met where public radio staff composed, reviewed and edited sponsor acknowledgements to ensure compliance with federal and station guidelines).

3. *Municipalities Are The Literal Speakers*

A municipality becomes the "literal speaker" upon the transfer of a monument's ownership. While the Tenth Circuit acknowledged this in *Ogden*, it hesitated to declare this third factor satisfied because the Eagles had composed the speech. 297 F.3d at 1005. Under *Johanns*, however, a message may be gov-

ernment speech even where the exact words are composed by private persons. 544 U.S. at 560.

Under the most analogous case law on this factor, the specialty license plate cases, Pleasant Grove satisfies the third factor. The majority view holds that the individual vehicle owner is the literal speaker. This is based on his intentional display of the government-manufactured values message and on public perception that the message display is purposeful. *Stanton*, 515 F.3d at 967 (collecting cases); *Choose Life*, 2007 WL 178455 at *6)("[T]he specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages. Indeed, no one who sees a specialty license plate imprinted with the phrase "Choose Life" would doubt that the owner of that vehicle holds a pro-life viewpoint."). *Compare Wooley v. Maynard*, 430 U.S. 705 (1977)(because any message on a license plate is connected to the owner or driver of the vehicle, requiring all residents to display the state's motto on their cars' license plates held unconstitutional compelled speech). Presenting the converse situation, here, a municipality intentionally displays a message created by a private individual, in circumstances where the public perception is that municipalities are responsible for any messages conveyed by monuments located in municipal parks.

4. *Municipalities Have "Ultimate Responsibility"*

Municipalities have "ultimate responsibility" for the content of monuments they display. *Ogden*, 297 F.3d at 1005 (holding this fourth factor satisfied because "[a]fter the City acquired title to the Monument. . . presumably the City could have sold, re-

gifted, modified or even destroyed the Monument at will"). In the Municipal Practice Examples, the majority of respondents with personal knowledge answered that the municipalities they represent have legal ownership and physical control of the donated monuments. (*See* App. C.)

Even in the absence of clear government ownership, this factor also is demonstrated by municipalities' legal responsibility for monuments in their parks. *See Wells*, 257 F.3d at 1142 ("this litigation is itself an indication that the City bears the ultimate responsibility for the content of the display"); *Univ. Mo.*, 203 F.3d at 1094 (noting radio station's ultimate responsibility for all broadcasts, including sponsor acknowledgments, because station was subject to legal sanctions for failure to comply with its statutory legal obligations).

Regarding donated monuments, anyone who alleges some harm caused to them by a statue in a park, whether physical, emotional, or constitutional, will sue the municipality. It is highly unlikely that anyone would take legal action against the original donor of the statue, even if their contribution is acknowledged by a donor plaque. *See* LEVINSON, *supra*, at 33 (noting, but not citing, a *New York Times* report that "at least one lawsuit has been filed, in Franklin, Tennessee, seeking not only removal of a statue of a Confederate soldier that towers over the town square but also $44 million in damages"). Once a monument is accepted and displayed in a public park, it becomes the government's speech, and the government speech paradigm should apply.

III. APPLYING THE GOVERNMENT SPEECH PARADIGM HERE PROVIDES FUNCTIONAL LIMITS ON MUNICIPAL DECISIONS AND HAS A POSITIVE IMPACT ON THE SPEECH MARKET

A. Limited Public Forum Analysis Is Unworkable Here Because Any Appropriate Content Limitations Are Subjective And Necessarily Include Viewpoint

Categorizing a city's display of privately-donated monuments as creating a limited public forum is a bad alternative. First, limited public forum analysis is unworkable here because any accumulation of privately donated monuments occurs over a long period of time, encompassing numerous administrations and evolving cultural norms. Second, appropriate types of content limitations, such as "relates to local history and culture," are subjective, and thus inherently reflect the decision makers' viewpoints; that violates the limited public forum test. Municipalities rightly want to create a positive, welcoming atmosphere in public parks, and doing so requires the discretion to decline divisive monuments.[10]

First, the limited public forum test does not fit occasional donations. Where government invites private speakers to use public property in a way not

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[10] Examples of standards directed towards that end from the MPE include the following limitations on donated monuments: Kalispell, Montana (#54)("engender respect, address community-wide concerns"); Missoula, Montana (#98)("all installations must be approved for content, political/public acceptability and legality as well as derogatory language or images); South Portland, Maine (#228)("suitable public purpose related to location and no endorsement of political or religious viewpoints").

generally open to the public, it may set reasonable content limitations, as long as they are viewpoint neutral. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983). Many municipalities do not have a written policy, or an established practice, regarding the types of donated monuments they accept because this is neither a regular occurrence, nor one the administration has invited. When courts find no established content limitations within an alleged "limited" public forum, they apply strict scrutiny. *See, e.g, Christ's Bride Ministries v. Southeastern Penn. Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998). In a context where years may go by between proposals for a new monument in a town, the ill fit of this type of analysis is easy to see.

Second, applying the limited public forum test, courts regularly have rejected attempts to screen out hate groups, advocates of discrimination, public controversy, and sectarian religious speech. *See* Dolan, *supra*, 31 HASTINGS CONST. L.Q. at 72-99 (and collected cases).[11] Most compelling here are the cases where states have been forced to include the KKK in the Adopt-a-Highway program, in which government signs posted by the side of the road thank the listed organization for its work in keeping that stretch of highway clean. *E.g., Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000). *See also Nat'l Abortion Rights Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F.Supp. 2d 1320 (N.D. Ga. 2000)(holding unconstitutional a

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[11] This *amicus* brief uses the term "limited public forum" throughout to mean a context where the *Perry* "reasonable content limitations/no viewpoint discrimination" test applies. There continues to be controversy in the courts about terminology, and whether a "nonpublic forum" is equivalent. *Id.* at 77 n.27 (collecting cases); *Ogden*, 297 F.3d at 1002.

transit advertising policy excluding "controversial" ads, despite attempt at detailed, objective definition, on grounds that governmental discretion in a limited public forum gives administrators too much room for viewpoint discrimination).

The limited public forum doctrine does not provide a shield against monuments that are harmful to the community or its spirit. Already, Fred Phelps has proffered anti-homosexual monuments to cities within the Tenth Circuit. Boise, Idaho (#67/#229) has removed its pre-existing Ten Commandments monument in order to refuse this spiteful symbol without legal risk. It also implemented a policy against "inflammatory or discriminatory" monuments. On a less clear note, one Missouri town (#30/#192) explained that it "rejected [a] plaque to commemorate [the] illegal hangings by [a] mob of three black men in [the] early nineteen hundreds in the public square," on the grounds that the "language was inciting and not necessarily accurate." Especially given that the town allowed a plaque for the "first recorded gunfight west of [the] Mississippi," involving "Wild Bill Hickock," the distinction looks more like viewpoint discrimination, allowing some acts of local history and not others. Yet one evokes a colorful past that vacationing families enjoy play-acting, and the other a painful chapter that causes division among residents even today. Going back to the municipal function of shaping public parks as welcoming spaces with inspiring symbols, that decision may be a sound use of discretion.

Two cases show why the government speech paradigm is preferable to limited public forum analysis in expressive contexts, such as park monuments. The first, *Putnam Pit, Inc. v. City of Cookeville*, 76 F.

App'x. 607 (6th Cir. 2003)(*Putnam II*), shows the illogic of stretching limited public forum analysis to its breaking point, in an expressive context where only government speech will do.

Putnam is one of the few cases involving a municipal web-site and whether adding hyperlinks to private web pages creates a forum. There, a non-resident, Mr. Davidian, became obsessed with an unsolved murder in Cookeville and started a website describing the City's alleged corruption. After denying his request to add his website to the City's "local links" web page, the City adopted a policy that hyperlinks must not only relate to City services, attractions and officials, but also must promote the City's tourism and economic welfare. *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000)("*Putnam I*"). Davidian then added a tourism page to his website, which included information about health department restaurant investigations, and also claimed that his scrutiny of the City promoted its long-term welfare.

In *Putnam I*, the Sixth Circuit reversed summary judgment for the City because the discretionary standard and its application suggested viewpoint discrimination, which violates the limited public forum test. 221 F.3d at 845-46. In *Putnam II*, however, the court upheld the jury's finding that because Davidian's website was critical of the City and its officials, it was outside the content limitation of "promoting" the City; thus, they did not reach the issue of viewpoint discrimination. 76 F. App'x. at 613. Categorizing speech that promotes the government as a "content limitation" – and saying that excluding speech that criticizes the government is not "viewpoint discrimination" – turns these concepts

inside out and cannot be relied on as sound legal counsel for municipalities.

In the other, the D.C. Circuit upheld a city's rejection of PETA's entry in a temporary sidewalk sculpture display called "Party Animals." *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005). PETA argued, and the district court agreed, that because the City had accepted other sculptures that were outside the stated criterion, "festive," including 9/11 tributes, rejection of its "suffering circus elephant" was viewpoint discrimination. *Id.* at 27. The appellate court held that the sculptures displayed were government speech instead, within the *Forbes/Finley* model, because the municipal decision-makers retained the right to approve designs and reject anything they considered inappropriate. *Id.* at 30.

When city officials are assessing a monument proposal from a private donor organization, they are making complex, irreducible value judgments. For example, the idea of honoring Upton Sinclair, a celebrated muckraker, may be appealing to later generations who are benefiting from different injustices, but thought destabilizing in his time. One city may memorialize its slain local soldier with large, realistic weapons in hand, while another location creates a kneeling soldier, head bowed. And what is "historical" to one person, is "religious" to another. Only the government speech doctrine allows municipalities to shape and edit their public landscapes through monument displays that correspond with local community values and tastes.

B. RECOGNIZING MONUMENT DISPLAY AS GOVERNMENT SPEECH IS GOOD POLICY

1. Counter-Speech In Parks Shows That Private Speech Thrives When Municipalities Make Monument Decisions

The location of the challenged monument actually cuts in favor of finding government speech. Precisely because it is situated in a public forum, there is ample opportunity for speech activities, including counter-speech. In city parks, there is no reason for concern that a relatively small amount of government speech, in the form of monuments of various pedigrees, will crowd out or dominate the on-site private speech.

The MPE confirms this fact and more, for municipal park locations across the country. As it turns out, in some instances, the very existence of the donated monument has a positive impact on private speech: it serves as a focal point for protests and rallies. For example, in Kalispell, Montana (#54), a private donor group recently sought and obtained the city council's permission to place "a large bronze statue depicting an American soldier kneeling," in the city's "most highly visible park." The respondent stated: "Since the monument was installed, the area has been used for rallies both for and against the war in Iraq." And in Boise, Idaho (#67/#229), there are frequently human rights and other rallies around the Anne Frank Memorial. *See also* Appendix C.

Similarly, the Summums retain the opportunity to spread their message in Pleasant Grove's parks, through traditional public forum speech activities,

such as organized gatherings and literature distribution. They, too, may use the challenged monument as a stimulus for counter-speech. The First Amendment, however, does not require the City to spare them this effort by letting them leave a permanent stone text at that location. *Compare United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205, 214, 218 (2003) (Kennedy, J., concurring) (Breyer, J., concurring) (while plurality relied on government speech rationale to uphold federal requirement that libraries install internet pornography filters; Justices Kennedy and Breyer concurred because, given that adults are able to ask libraries to turn off filter, their speech rights are minimally impaired).

2. *Constitutional and Political Limits on Government Speech Protect Community Members*

Finally, government speech is not unlimited. The Establishment Clause, of course, provides the clearest constitutional constraint. The Ten Commandments monument at issue in this case appears to share a physical and historical context that is analogous to that upheld by this Court in *Van Orden v. Perry*, 545 U.S. 677 (2005), but the Establishment Clause is not an issue presently before the Court. Whether express recognition of the monument as government speech creates an additional analytic step, or makes no difference, is a question for another day.

Also, other limitations have been identified, given the government speech doctrine's potential to affect First Amendment protections. Examples include proposed limitations on partisan government speech that seeks to perpetuate an administration and on viewpoint-based speech aimed at retaliating for a

private speaker's exercise of freedom of speech. *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085, 1106-10 (E.D. Cal. 2003)(giving a thorough, succinct judicial overview of potential limitations on government speech). *See also* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (Jan. 2000)(expressing concerns over "ventriloquism" and coercion, and collecting articles proposing limits on doctrine); James Foreman, Jr., *Driving Dixie Down: Removing the Southern Flag from Southern Capitols*, 101 YALE L.J. 505 (1991)(asserting that racist government speech violates the First Amendment and, under some circumstances, the Equal Protection Clause of the Fourteenth Amendment).

Most significantly, municipalities may be constitutionally prohibited from accepting and displaying hate monuments. In two cases, this Court has recognized that for government to act based solely on animus for a disfavored group is not a legitimate government function. *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional a state statute criminalizing a sex act only for homosexuals); *Romer v. Evans*, 517 U.S. 620 (1996)(striking down a Colorado constitutional amendment that restricted state and local laws and regulations from protecting homosexuals from discrimination). *See* Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEX. L.REV. 1273, 1282-83 (2006-07)(reading *Romer* and *Lawrence* as "support[ing] the conclusion that the gratuitous disparagement of homosexuals is unconstitutional"); Steven Goldberg, *Beyond Coercion: Justice Kennedy's Aversion to Animus*, 8 U. PA. J. CONST. L. 801, 807 (2006)(arguing that municipal display on courthouse wall of private organization's plaque condemning gays could be unconstitutional).

This last potential constitutional restraint on government speech mirrors an important policy reason for extending the doctrine here, to municipalities' display of privately-donated monuments. In most if not all cases, city governments are motivated by good will, or at least political accountability, to permit installation of public monuments only where they are respectful of all citizens. Labeling such park monuments a public forum removes all municipal discretion to create beautiful, welcoming public green space in America's cities.

CONCLUSION

This Court should recognize privately-donated monuments installed in government-owned parks as government speech, so that elected representatives can create open space that builds community and reflects local values, history and culture. The International Municipal Lawyers Association, *amicus curiae* on behalf of the Petitioners, respectfully requests this Court to reverse the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

Municipal Practice Examples—IMLA's Questionnaire Process

Within the brief time frame available, IMLA undertook to collect from its approximately 2500 members, and to provide the Court, examples of municipal practice regarding privately-donated monuments displayed in parks. These members are attorneys who represent municipalities, both as government employees and outside counsel. The tool used was an online service, www.surveymonkey.com. IMLA's Counsel of Record drafted a questionnaire seeking information on facts relevant to the legal questions in this case. IMLA sent an email to all its members, asking them to open a hyperlink to the "survey monkey" page and complete the questions. A copy of the questionnaire used is set forth in Appendix B. The cover email was identical to the text in the "Instructions and Purposes" section of the questionnaire.

Note that the questionnaire responses likely were not affected by significant bias for several reasons. First, although the questionnaire indicated that responses would help IMLA in this *amicus* brief, under existing case law, it is not clear what types of responses would help or harm municipalities' legal interests in this case. The "non-applicable" responses, described below, also indicate this uncertainty. Second, many responses appeared contrary to how the respondent perceived the client's interests. For example, a number of narrative responses indicated that the respondents believed municipal legal positions are enhanced by having in place a written policy, but few indicated that their clients had such a policy. Finally, most respondents appear

to be general municipal law practitioners, rather than First Amendment or appellate specialists.

Between April 24th and May 15th, 2008, IMLA received a total of 238 responses. (Note that the original deadline, based on the original *amicus* brief due date, was April 30th, and the bulk of the responses were received within that initial time frame.) Of the 238 total responses, 117 were deemed responsive and used for examples and analysis in these Appendixes and the brief.

Of the 238 total responses, 88 gave no response to the substantive questions, but only completed all or part of the optional first question, which requested name, municipality, and contact information. Counsel of Record's assistant sent a follow-up email to these non-respondents (N/R), asking which of a list of potential reasons for not completing any of Questions Nos. 2-16 applied to them. Of the 20 who replied, 16 reported that the municipalities they represent do not display privately-donated monuments, 2 did not have the requested information, 1 had technical difficulties, and 1 was filing a brief in the case.

In addition, of the 238 total responses, 16 responses were excluded from IMLA's legal analysis for this brief because they were not relevant enough to the legal questions presented in this case (N/A). Three represented municipalities in Canada, and 13 provided responses related to speech activities other than privately-donated, permanent monuments in parks (e.g., temporary banners or murals on a government building). Substantive responses were excluded from the set of "117 Applicable Responses" (summarized in Appendixes C and D) solely because of the reasons stated in this paragraph.

Finally, of the 238 total responses, 16 were duplicates, i.e., they self-identified as representing municipalities for which there were one or more other responses. Note that most of those were N/R, but they are accounted for here in this separate category. Some of them contained additional narrative information. In those cases, all narrative information was used, but only one set of multiple-choice answers was counted per municipality. There were no identified inconsistencies.

The complete results of the questionnaire are maintained at both The John Marshall Law School, Chicago, Illinois, office of Counsel of Record, and at IMLA, 7910 Woodmont Avenue, Suite 1440, Bethesda, Maryland, 20814. In addition, these materials can be lodged with the Court upon request. These complete results consist of: (1) the full set of responses (2-3 pp. from each of the 238 respondents, including the N/R and the N/A responses, automatically generated by survey.monkey.com); (2) survey.monkey.com automatically-generated summaries of all narrative answers listed by question number (and not listed or cross-referenced by respondent number); (3) a survey.monkey.com automatically-generated report summarizing all 238 responses, using percents and bar graphs (not presented in this Appendix because those numbers included the N/A responses); and (4) an Excel spread sheet compiled by an assistant to Counsel of Record, which lists all responses to each question for the "117 Applicable Responses" in a user-friendly presentation; (5) a list identifying the N/R responses, and the reasons given, if any; (6) a list identifying the N/A responses and the reasons; and (7) a list of duplicates.

APPENDIX B

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

IMLA Survey

Instructions and Purpose:

We are asking all IMLA members to respond quickly to a brief online survey. Doing so will assist IMLA in representing municipal interests by filing an amicus brief in *Pleasant Grove v. Summum*, a case in which the United States Supreme Court recently granted cert. At issue is whether municipal display of a privately-donated monument in a public park is government speech or creates a public forum for private display of monuments. There are only sixteen short questions to this survey. Please reply as soon as possible.

Questionnaire Directions:

- If you represent more than one municipality, please choose one on which to base your answers, giving preference to the one on which you have the most information relevant here.
- Please complete only those questions regarding which you have personal knowledge or other reliable evidence. **You do not need to answer all questions to provide helpful information.**
- Please provide narrative information where available and responsive.

- For every question, **please check all that apply.**
- The term "monument" as used herein means a permanent fixed structure that must be erected or installed, and which conveys or tends to convey some communicative message.
- The term "private person" as used herein includes organizations.
- The term "municipality" as used herein includes affiliated governmental or quasi-governmental agencies, such as park districts and public building commissions.

1. Optional Information:

Municipality Represented: _____
Population of Municipality: _____
Your name:_____
Position Held: _____
Email:_____

SURVEY PART I

Please answer the following questions if, to your knowledge, the municipality you represent has been offered, accepted or rejected any monument(s) by/ from a private person during a time period of which you have knowledge. *If there is more than one monument of which you are aware, please use the text box to explain further, including any differences in answers.*

2. Type of monument(s) (check all that apply):

__ memorial __ other historical __ local __ cultural
__ public art __ any religious aspect __ other
please describe: _____

3a. What were the circumstances (check all that apply)?

__ private donor initiated __ private donor responded to municipal request for proposals (RFP)
__ other (specify)

3b. What action was taken by the municipality?
__ accepted __ rejected __ please describe:
_____

4. Identify the municipal decision-maker(s) regarding acceptance/rejection and display of the monument(s)? (check all that apply)

__ planning or cultural department personnel
__ municipal executive (i.e., mayor)

__ legislative body (i.e., city council) __ public-private committee __ other
please describe: _____

5. Did the city employ any content-related criteria (e.g., local historical significance) in determining acceptance/rejection/placement of the monument(s)? __ yes __ no __ don't know

6. If you answered "yes" to question 5, were such criteria set forth in any of the following (check all that apply):

__ written policy __ request for proposal
__ ordinance __ regulation __ contract
__ established practice __ other please describe: _____

7. Did the municipality exercise any control over the message, wording, or appearance of the monument(s)? __ yes __ no __ don't know

8. If you answered "yes" to question 7, was that control demonstrated by (check all that apply):

__ prior submission of proposed words and images
__ modification of wording __ design input
__ other please describe: _____

SURVEY PART II

The following questions apply to all monuments displayed in municipal parks, which were or appear to have been donated, in whole or in part, by private persons, including both those described in Part I of this Questionnaire, and those installed in an earlier time period.

9. Does the municipality own the monument(s)?
__ yes __ no __ some, but not all __ don't know

10. If you answered "yes" or "some, but not all" to questions 9, is that ownership shown by:
__ contract __ deed __ ordinance__ other please describe:_____

11. Does the municipality have a right to control the monument(s), including, but not limited to, the right to: __ move __ remove __ dispose __ don't know please describe:_____

12. Does the municipality maintain (i.e., clean and repair, as needed) the monuments?
__ yes __ no __ don't know

13. In the area(s) adjacent to the monument(s), is the public permitted to engage in speech-related activities (check all that apply):
__ yes __ no __ don't know.
__ speech ___ assembly __ protest __ distribution of leaflets/other communicative material
__ other (please explain):_____

14. If you answered "yes" to question 13, are you aware of such activities taking place from time to time? ___ yes ___ no

15. Are you aware of any instances where members of the public engaged in any of the above-described speech-related activities in the area(s) adjacent to the monument(s) where the content of the speech was in some manner *related to the monument(s)* or its implied or stated message(s)? __ yes __ no
If yes, please describe, including approximate time period and outcomes: _____

16. Are you aware of any instances of expressed public opposition to the existence or location of a monument, whether proposed, new, or previously-existing? ___ yes __ no
If yes, please describe, including approximate time periods and outcomes: _____

THE SURVEY IS NOW FINISHED. THANK YOU FOR YOUR INPUT.

APPENDIX C

IMLA Questionnaire Summary
(of the 117 Applicable Responses)

- **Respondent Identified Municipality and Gave Contact Information (Question #1):**
  Identified: **104**
  Unknown: **13**

- **Type of Monument (Question #2)**
  Memorial: **76**
  Other Historical: **55**
  Local: **22**
  Cultural: **28**
  Public Art: **65**
  Any Religious Aspect: **14**
  Other: **8**
  (**Note:** many respondents checked several)

- **Circumstances of Donation (Question #3a):**
  Private Donor Initiated (PDI): **71**
  Multiple Responses Including Private Donor Initiated: **101**
  Private Donor Responded ("PDR") to Municipality's Request (PDR only): **6**
  Other: **7** (Other responses clarify that municipalities have privately donated monument(s))
  NR: ***1*** (same)
  (**Note:** many respondents checked several)
  (**Note:** NR = "no response"—question left blank)

- **Monument Accepted or Rejected (Question #3b):**
  Accepted monument(s): **102**
  Rejected monument: **3**
  #77 (Unknown)—monument rejected due to religious nature

#182 (New Smyrna Beach, Fla.), #234 (Fargo, North Dakota)—no reason given

Accepted some & rejected others: **10**

#26 (Neenah, Wisconsin)—three bust display of twin cities' founders rejected by other city due to a neighbor's objection

#28 (Sheboygan, Wisconsin)—original location of the Hmong-American Vietnam Memorial rejected by city council, monument later approved in a new location

#29 (Ann Arbor, Michigan)—sculpture rejected after no suitable location found

#30/#192 (Missouri)—plaque to commemorate the hanging of three black men in town square in early nineteen hundreds rejected as "inciting and not necessarily accurate"

#67/#229 (Boise, Idaho)—recently rejected anti-homosexual monument from Fred Phelps

#115 (Benicia, California)—rejected monument to deceased children as "too religious"

#135 (Winnetka, Illinois)—rejected public artwork—no reason given

#198 (Hartford, Connecticut)—rejected a Puerto Rican family statue—no reason given

#203 (Durango, Colorado)—no specifics given

#207 (Independence, Missouri) —no specifics given

NR: **2**

■ **Municipal Decision Makers (Question #4)**

Requires Legislative Action: **93**

Public or Cultural Department Personnel: **29**

Public-Private Committee: **22**

Requires Executive Action: **39**

Other: **17**

(**Note:** many respondents checked several)

- **Content-Related Criteria (Questions ##5-6):**
  Responded that municipality uses content-related criteria: **57**
    Written Policy: **16**
    Established Practice: **21**
    Other: **20**
  Responded that municipality does not use content-related criteria: **41**
    (*But see* Appendix D, compiling relevant responses for **112** municipalities, listed by municipality, and showing that content control often displayed through answers to other questions)
  Don't Know: **16**
  NR: **3**

- **Control over the Message, Wording or Appearance (Questions ##7-8)**
  Responded that municipality exercises control over the message, wording or appearance: **65**
    Design Input: **43**
    Prior Submission: **34**
    Modification of Words: **8** (*see* App. D for detail)
    (Note: some respondents checked several)
  Responded that municipality does not exercise control over message etc.: **38**
    (*But see* Appendix D, compiling relevant responses for **112** municipalities, listed by municipality, and showing that content control often displayed through answers to other questions)
    Don't Know: **11**
    NR: **3**

- **Municipal Ownership of Monument (Questions ##9-10):**
  Municipality owns monument(s): **69**
  Municipality owns some, but not all, monuments(s): **22**
  Municipality does not own monument(s): **6**
  NR: **15**
  Don't know: **5**

- **Municipality Controls Monument (Question #11):**
  Right to controls monument(s) (e.g., move/remove/dispose): **68**
  Don't know: **3**
  NR: **46**
  (**Note:** based on the wording of Question #11, "NR" here may, but does not necessarily, mean municipality does not have right to control monument(s))

- **Municipality Maintains Monument (Question #12)**
  Yes: **76**
  No: **15**
  Don't know: **12**
  NR: **14**

- **Speech Activities Permitted Around the Monument (Questions ## 13-14)**
  Allowed: **102**
  Aware of such activities taking place: **69**
  Not Allowed: 3
  NR: **12**

- **Speech Related to Monument & Occurring Around the Monument (Question #15)**
  Aware of such monument-related speech activities around monument: **32**
  Not aware of such activities: **67**
  Don't Know: **1**
  NR: **17**

- **Public Opposition to the Existence or Location of Monument (Question #16):**
  Opposition to the monument: **24**
  (Please see summary of Question #3b for following four where monuments rejected: #26, #28, #30, #67)
  #13 (Newton, Kansas)—opposition to cost
  #32 (Moorhead, Minnesota)—person complained re wording on monument—city met with person and worked out a compromise
  #56 (Madison, Wisconsin)—opposition to monument re gay rights—city proceeded
  #59 (Eau Claire, Wisconsin)—ACLU questioned monument with religious connotation
  #63 (Idaho Falls, Idaho)—one letter from an individual questioning Ten Commandments monument
  #73 (Bozeman, Montana)—no details given
  #86 (Portland, Oregon)—location
  #92 (Longview, Washington)—monument questioned re accuracy
  #93 (Arlington, Texas)—area churches requested removal of Stonehenge monument
  #98 (Missoula, Montana)—veterans group opposed a police monument close to the veterans monument
  #102 (Marana, Arizona)—opposition to public art's unprofessional look

#142 (Unknown)—lawsuits re cross monument
#166 (Yuma, Arizona)—complaint re Ten Commandments monument
#174 (Charlottesville, Virginia)—concerns that interactive First Amendment monument could encourage vulgarity or inflammatory messages
#199 (Troy, Michigan)—location
#204 (Eagle, Idaho)—location
#205 (Carlsbad, California)—city sued over public artwork display
#221 (Ogden, Utah)—lawsuit re Ten Commandments monument
#227 (Pendleton, Oregon)—complaints re proposed monument, proceeded
#232/#235/ #237 (Tucson, Arizona)—Pancho Villa monument opposed by some citizens as honoring villain, not hero

APPENDIX D

Summary of Sources of Municipalities' Content and Editing Control of Privately-Donated Monuments

NOTE: This Appendix D shows that of the 117 Applicable Responses, 112 of them indicate that the municipality exercised some form of content control over selection and display of donated monuments in city parks. Content control is shown by one or more of the following three responses: (1) Question No. 4 (re: municipal decision maker), combined with a narrative response to Question No. 2 (re: type of monument where given); (2) Questions Nos. 5-6 re "content-related criteria," such as in written policies; and (3) Questions Nos. 7-8 re: editing control, such as prior submission, design input, or modification of words. (See also explanation in Amicus Brief, II.A.2.)

Municipality	Demonstrated Content Control
1. Albion, Michigan (#141)	Legislative decision on monument to industry / requires prior submission
2. Ann Arbor, Michigan (#29)	Legislative decision on artwork and sculpture / requires prior submission
3. Arlington, Texas (#93)	Legislative decision on Stonehenge Monument / required modification of words
4. Baldwin Park, California (#130)	Legislative decision on public art displays honoring individuals who have died in Iraq / written policy / requires prior submission and design input

5. Beaverton, Oregon (#119)	Executive decision on monument and public art displays / written policy
6. Bellingham, Washington (#216)	Executive decision on veteran's memorial / required design input
7. Beloit, Wisconsin (#5)	Legislative & Executive decision on monument of Civil War Cannon and various public art pieces / monuments required to have "local historical significance"
8. Benicia, California (#115)	Legislative decision on Pony Express monument, Civil War monument, and children's memorial / established practice
9. Boise, Idaho (#67 & 229)	Legislative & Executive decision on religious monument / written policy and ordinance
10. Boulder County, Colorado (#197)	Legislative decision on monuments / written policy / requires prior submission
11. Carlsbad, California (#205)	Legislative decision on monument and public art displays / written policy
12. Centerville, Ohio (#72)	Legislative decision on sculptures and public art displays / requires prior submission

13. Charlotte, North Carolina (#228)	Legislative decision on Holocaust memorial and other statues / content review for artistic "value" and appropriateness / required design input
14. Charlottesville, Virginia (#174)	Legislative decision on Vietnam Memorial and monument to the First Amendment / required design input
15. Cleveland, Ohio (#172 & 210)	Legislative & Executive decision on monuments and sculptures / required design input where hearings were held to review the work
16. Durango, Colorado (#203)	Legislative decision on Vietnam and Korean War memorial and public art displays / written policy and established practice
17. Eau Claire, Wisconsin (#59)	Legislative decision on Angel of Hope monument / request for proposals and established practice / requires prior submission and design input
18. Fairborn, Ohio (#21)	Legislative decision on monument/ required design input

19. Franklin, Pennsylvania (#201)	Legislative decision on war memorials and other monuments / established practice / requires prior submission
20. Fredericksburg, Texas (#78)	Legislative decision on monument to local war heroes / requires prior submission and design input
21. Gainesville, Florida (#113)	Legislative decision on monument and public art displays / request for proposals and contract / required design input
22. Glendale, California (#109)	Legislative decision on Vietnam War memorial / required design input
23. Greenhorn, Oregon (#238)	Legislative decision on monuments / written policy / required design input
24. Hartford, Connecticut (#198)	Legislative & Executive decision on MLK statue, Puerto Rican Family statue, and memorial to fireman who have died on the job / required design input and prior submission
25. Hood River, Oregon (#128)	Legislative decision on Sister City Memorial / required design input

26. Idaho Falls, Idaho (#63)	Legislative & Executive decision on Ten Commandments monument / "historical" criteria required
27. Independence, Missouri (#207)	Established practice / requires prior submission and design input
28. Jacksonville, Arkansas (#220)	Legislative & Executive decision on monuments / required design input and prior submission
29. Kalispell, Montana (#54)	Legislative decision on bronze statue of American Soldier kneeling / established practice required "high standards for presentation" / required design input
30. Kansas City, Missouri (#117)	Legislative decision on fountain, Cancer Survivors Memorial, and Hispanic culture monument / established practice and ordinance / required design input
31. Lakeville, Minnesota (#19)	Legislative decision on Veteran's memorial / established practice / required design input
32. Layton City, Utah (#108)	Legislative & Executive decision on World War II monument / requires prior submission

33. Lexington, South Carolina (#213)	Legislative decision on cultural displays / required design input
34. Longview, Washington (#92)	Legislative decision on war memorial, Sacagawea Monument, totem poles, and Virgin Mary statue / regulations and established practice / requires prior submission, modification of words, and design input
35. Madison, Wisconsin (#56)	Legislative & Executive decision on historical and public art displays / request for proposals / required design input
36. Marana, Arizona (#102)	Legislative & Executive decision on monuments and public art displays / established practice of "historical" content / requires prior submission
37. Missoula, Montana (#98)	Legislative & Executive decision on public art display and war monuments / written policy, request for proposals, an ordinance, and established practice / requires prior submission, modification of words, and design input
38. Moline, Illinois (#40)	Legislative decision on monuments and public art / requires prior submission and design input

39. Moorhead, Minnesota (#32)	Legislative decision on Viking ship monument and Norwegian Stave Church / required modification of words after acceptance to make content of message "less religious"
40. Nashville, Tennessee (#85)	Legislative & Executive decision on monument and public art displays / written policy, request for proposals, and ordinance / requires prior submission and design input
41. Neenah, Wisconsin (#26)	Legislative & Executive decision on bust display of founders of the City / required modification of words and design input
42. New Smyrna Beach, Florida (#182)	Legislative decision on Peace Pole / had advice of counsel / requires prior submission
43. Newport News, Virginia (#79)	Legislative decision on monument and public art displays / written policy of "seven criteria" / requires prior submission
44. Newton, Kansas (#13)	Legislative decision on public art / required design input
45. Norfolk, Nebraska (#8)	Legislative & Executive decision on World War II monument / requires prior submission and design input

46. Normal, Illinois (#88)	City manager approves historical and public art displays / requires prior submission
47. Ogden, Utah (#221)	Legislative decision on monuments and public art displays / written policy, ordinance, and regulations / requires prior submission, modification of words, and design input
48. Oxnard, California (#125)	Executive decision on monuments and public art displays / written policy and ordinance
49. Palestine, Texas (#150)	Legislative decision on railroad caboose monument / established practice and criteria requiring "historical significance"
50. Pendleton, Oregon (#227)	Legislative decision on public art displays / required design input
51. Peoria, Arizona (#123)	Executive decision on farm equipment monument / required design input
52. Pocatello, Idaho (#175)	Legislative decision on monument and public art memorial to Native Americans / required modification of words

53. Port Huron, Michigan (#71)	Legislative decision on historical plaques / requires prior submission and design input
54. Portland, Oregon (#86)	Legislative decision on Oregon Holocaust Memorial, Oregon Vietnam Veteran's Memorial, Japanese-American Historical Plaza, and Portland Police Memorial / written policy / requires prior submission and design input
55. Portsmouth, New Hampshire (#80)	Legislative & Executive decision on monuments and public art displays / required "historical significance"
56. Richfield, Minnesota (#1)	Legislative decision on monument / requires prior submission
57. San Ramon, California (#104)	Legislative & Executive decision on monument and public art / request for proposals, ordinance, and regulations / required design input
58. Sedona, Arizona (#76)	Legislative decision on sculptures of Western heritage / established practice / requires prior submission and design input
59. Skokie, Illinois (#118)	Legislative & Executive decision on monument and public art / established practice

60. South Portland, Maine (#52)	Legislative decision on historical marker and World War II monument / established practice / requires prior submission and design input
61. Springfield, Missouri (#30 & 192)	Legislative decision on historical monument / requires prior submission
62. St. Petersburg, Florida (#162)	Executive decision on monument and public art displays / ordinance and criteria giving preference to "historical significance" / required design input
63. Troy, Michigan (#199)	Legislative decision on monuments and public art / written policy and established practice / requires prior submission and design input
64. Tucson, Arizona (#232; 235 & 237)	Executive decision on war monuments and statues of historical figures / written policy, regulations, and established practice / requires prior submission, modification of words, and design input
65. Tulsa, Oklahoma (#11)	Legislative & Executive decision on monuments / establish practice / requires prior submission
66. Upper Arlington, Ohio (#14)	Written policy for acceptance of cultural and public art displays Executive decision on

67. Waverly, Tennessee (#170)	monument / required design input
68. Wheeling, West Virginia (#27)	Executive decision on Veteran's sculpture / ordinance and a requirement of local historical or military background / requires prior submission
69. Winnetka, Illinois (#135)	Legislative decision on war memorial and MLK memorial / criteria of "historical significance" / required design input
70. Yuma, Arizona (#166)	Established practice of "national heritage plan" / required design input
71. Respondent #34	Legislative decision on "horse sculptures" / established practice / requires prior submission
72. Respondent #66	Written policy / requires prior submission
73. Respondent #142	Legislative decision on monuments / criteria of no obscenity
74. Respondent #149	Legislative decision on confederate monument and public art / request for proposals and ordinance / required design input where art commission reviews

75. Respondent #167	Legislative decision / public discussion on Veteran's memorial / required design input
76. Respondent #215	Legislative decision on monuments and public art displays / established practice

Municipalities' Content Control of Privately-Donated Monuments by Legislative and/or Executive Decision(s) Only

Municipality	Demonstrated Content Control
1. Atlanta, Georgia (#33)	Executive decision on gift to celebrate 1996 Olympics
2. Bozeman, Montana (#73)	Legislative decision on Ten Commandments monument
3. Cedar City, Utah (#60)	Executive decision on statues for soldiers
4. Cibolo, Texas (#138)	Legislative decision on statue of former City manager
5. Coeur D'Alene, Idaho (#106)	Legislative decision on monuments and public art displays
6. Colorado Springs, Colorado (#137)	Legislative decision on monuments and public art displays
7. Concord, North Carolina (#20)	Legislative & Executive decision on Peace Pole donation
8. Delaware, Ohio (#209)	Legislative decision on monument to police killed in the line of duty

9. Des Moines, Iowa (#69)	Legislative decision on public art display
10. Duluth, Minnesota (#101)	Legislative decision on monuments and public art display
10. Eagle, Idaho (#204)	Legislative decision on Angel Monument to children who have died
11. Fargo, North Dakota (#234)	Legislative decision on Ten Commandments monument
12. Fayetteville, Arkansas (#211)	Legislative & Executive decision on peace fountain
13. Gallup, New Mexico (#165)	Legislative & Executive decision on monument for Bataan Death March
14. Huntsville, Texas (#183)	Legislative decision on public art display
15. Ketchikan, Arkansas (#176)	Legislative decision on monument and public art displays
16. Kettering, Ohio (#185)	Legislative & Executive decision on monument and public art to lives lost in 9/11
17. Kimball, Nebraska (#164)	Legislative & Executive decision on monument
18. Lowell, Arkansas (#223)	Executive decision on antique fire truck monument
19. Norton Shores, Michigan (#144)	Legislative decision on monument artwork

20. Olney, Illinois (#139)	Legislative decision on monument and historical display
21. Provo, Utah (#225)	Legislative & Executive decision on Ten Commandments monument and war memorials
22. Rockford, Illinois (#44)	Legislative decision on "Millennium Fountain"
23. San Antonio, Texas (#129)	Legislative decision on public art displays and statues of famous Texans
24. Sheboygan, Wisconsin (#28)	Legislative decision on "Hmong-American Vietnam War Memorial
25. South Bend, Indiana (#218)	Executive decision on memorial to workers who have died on the job and children who have died violently
26. Spanish Fork, Utah (#188)	Legislative decision on monument to Fathers Dominguez and Escalante and a monument to the Icelandic population of the City
27. Springfield, Ohio (#153)	Legislative & Executive decision on monument and public art displays
28. Swartz Creek, Michigan (#148)	Legislative decision on war memorial
29. Warner Robins, Georgia (#133)	Legislative decision on historical displays

30. Washington County, Utah (#112)	Planning department decision on monument
31. Respondent #10	Legislative & Executive decision on statue of John A. Roebling
32. Respondent #47	Legislative & Executive decision on monument
33. Respondent #57	Legislative decision on historical display
34. Respondent #61	Legislative & Executive decision on monuments and public art
35. Respondent #70	Legislative decision on monuments, historical, and public art displays
36. Respondent #77	Executive decision on monument

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PLEASANT GROVE CITY, *ET AL.*, *Petitioners*,
v.
SUMMUM, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of Amici Curiae James Madison Center for Free Speech Supporting Petitioners

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June 23, 2008

Question Presented

Whether Pioneer Park's monuments constitute government speech, even though they were donated to the city by private citizens, and, as a result, the monument displays in the park are not subject to regulation as a public forum.

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Statement of Interest[1]

The mission of the James Madison Center for Free Speech ("Madison Center") is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous election law cases, including recent challenges to the Bipartisan Campaign Act of 2002 ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), and *Davis v. FEC*, No. 07-320 (2008).

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[1]No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Summary of Argument

This case turns on the nature of government speech. Forum analysis is only relevant when the government permits private speech on government property or in a government program. However, when the government is itself the speaker, it is not subject to the requirements of a forum.

To determine whether the government is speaking, this Court in *Johanns* established criteria that look at the level of control the government exercised over the message in the program involved. Whether the government was advancing a message that was subject to its control is the key in determining whether the government was speaking rather than creating a forum for private individuals to speak.

Pleasant Grove is the speaker here. Its message in Pioneer Park is a historical one, "commemorating" events in the city's history. It advances this message by approving the placement of privately donated "plaques, structures, displays), permanent signs and monuments" in its public parks or on city property that conform to its message. Because the city retains final approval authority over the message conveyed by the displays and continues to exert control over the them, the city is not creating a forum for private discussion, but is instead advancing its own message.

That Pleasant Grove's message involves the participation of nongovernmental parties does not render it private speech. As this Court has held, mere private participation in a government program, whether with the development of its message or its transmittal, does not convert the governmental mes-

sage to a private one. If it did, government programs that engage in promoting important public policies would be required to also express the contrary viewpoint. This is neither desirable nor tenable. Pleasant Grove—indeed any governmental entity—historically has been and should continue to be able to promote legitimate public policy goals, with the participation of private individuals who wish to support those goals, without the mandatory inclusion of contradictory messages.

Argument

The Tenth Circuit Court erroneously decided that Summum was deprived of its First Amendment rights by being excluded from a traditional public forum. App. 21a. In so doing, the court committed a series of jurisprudential missteps. It first assumed that Pioneer Park was inherently a public forum for purposes of forum analysis, App. 10a, and that assumption was premised upon the assumption that forum analysis was applicable. App. 8a-9a. However, the court neglected to evaluate the most fundamental component to this case: Whether the displays in the park at issue were government speech, rather than private speech, so that forum analysis was not applicable. This brief will focus on this omission.

I. Forum Analysis Is Inapplicable to Government Speech.

"The government, as a general rule, may . . . advocate and defend its own policies." *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). In doing so, "it may make legitimate and appropriate steps to ensure that its message is neither

garbled nor distorted." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). "[I]n the end, [the government is] accountable to the electorate and the political process for its advocacy." *Southworth*, 529 U.S. at 235. Because the government can be a speaker, the preliminary question in cases such as this must always be whether the relevant "program was designed to facilitate private speech [or] to promote a governmental message." *Legal Services Corp. v. Valazquez*, 531 U.S. 533, 543 (2001).

When a government program or property permits private speech, this Court's forum analysis jurisprudence becomes relevant. Three types of fora exist: a traditional public forum, a designated or limited public forum, and a nonpublic forum. A traditional public forum is a place which has traditionally been devoted to assembly and debate. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). A designated or limited public forum is one that the government opened up for public expressive activity. *Id.* A nonpublic forum is created when the government affords very selective access to government property based upon subject matter or speaker identity. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*473 U.S. 788, 806 (1985).

Whether a forum is traditionally public, is designated for a specific type of speech, or is nonpublic in nature affects the level of control the government may legitimately exert over the speech in that forum. *See U.S. v. Kokinda*, 497 U.S. 720, 726 (1990) (*citing Perry*, 460 U.S. 37). The government may limit content in a limited public or nonpublic fora, but may not limit content of a traditional public forum. *Perry*, 460 U.S. at

955 n.7. However, the government may not engage in viewpoint discrimination in any fora. *Id.* at 954-55.

If the government is the speaker, however, forum analysis is irrelevant and the government may choose the content and viewpoint of its speech. *See, e.g., Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005) (holding that a beef promotion program was clearly government speech and did not amount to compelled private speech); *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that Title X's exclusion of abortion-related services and advocacy from its funding constitutionally advanced the government's policies regarding family planning). The government in such circumstances neither creates a forum nor even affords selective access to a forum. Instead, the government is advancing its own policy. *Johanns*, 544 U.S. at 561-63.

II. Pioneer Park's Displays Are Government Speech.

To determine whether speech is government speech rather than private speech, this Court articulated two criteria in *Johanns*, 544 U.S. 550. In *Johanns*, the Court upheld as "government speech" provisions of *The Beef Promotion and Research Act of 1985*, 99 Stat. 1597, which created a federal policy to promote the marketing and consumption of beef and beef products, using funds raised by an assessment on cattle sales and importation. *See* 7 U.S.C. § 2901(b). The Court determined that the message of beef promotions was "government speech" for two reasons. First, "Congress and the Secretary [of Agriculture] set out the overarching message and some of its elements," *Johanns*, 544 U.S. at 560, and "the Secretary exercises final approval authority over every word used in every promotion

campaign." *Id.* Second, "[t]he Secretary of Agriculture . . . oversees the program . . . and retains absolute veto power over the advertisements' content." *Id.* at 563. That "the content is effectively controlled by a nongovernmental entity" did not render it private speech because "from beginning to end the message [was] established by the Federal Government," and the nongovernmental entity's "members are answerable to the Secretary." *Id.* at 560-61. What was relevant to the Court was 1) whether the government controlled the overall message conveyed, and 2) whether the government retained control over the promulgation of that message.

While the factual framework of *Johanns* involved government-compelled speech through funding, its analysis in determining the nature of the speech involved has broader applications. The Sixth Circuit decision in *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), demonstrates this. In *Bredesen*, the appellate court evaluated Tennessee's specialty license plate program to determine whether the "Choose Life" plate constituted government speech or was part of a designated forum. *Id.* at 375. The court relied upon *Johanns* to find that the program was government speech. *Id.* Tennessee had "the right to wield 'final approval authority'" over the plates in question, because approval of the plate with the "Choose Life" message was legislatively adopted. *Id.* at 376.

Pioneer Park works much the same way. First, the City of Pleasant Grove, by Resolution No. 2004-019, App. 1h-4h, determined that permanent placement of "any plaque, structure, display, permanent sign, or

monument" in a public park, such as Pioneer Park, must be approved by the city council, *id.* at 2h, and are eligible for approval if the displays satisfied such factors as that they "directly relate to the history of Pleasant Grove" and "commemorate" some such historical event. App. 2h-3h. The city council, thus, wields "final approval authority" over the displays in Pioneer Park.[2]

Second, the city council continues to have control over its message after a donation of a display is accepted. The donors are not free to remove their contribution in the park at their leisure. Danklef Dep. at 44. Only the city is authorized to do so. This continued control, coupled with the city council's initial ability to accept or refuse a donation to the park at the outset, renders Pioneer Park's display to be government speech under *Johanns*.

Indeed, the analogous nature of this case to that in *Johanns* is significant. Just as Congress created a coordinated program to promote its message that beef and beef products are desirable, *Johanns*, 544 U.S. at 561, so here Pleasant Grove created a coordinated effort with its residents to promote its historical message in Pioneer Park. Like Congress, the city council had specific factors it weighs to ensure its message is conveyed, expressly articulated by Resolution No. 2004-019. App. 1h-4h. And like the Secretary, the city council retains absolute veto power to change

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[2]That the city council considers factors rather than specific, mandatory requirements confirms a level of discretion and ultimate veto power consonant with government speech rather than a forum.

the message or the form of the message at any time. While the specific details of each display were designed or determined in the first instance by the individuals who sought to donate their display to the park, ultimately the city retained complete authority to determine if the message the display contained was and remains the message that Pleasant Grove seeks to communicate.

The displays in the park were placed there under governmental supervision and remained there at the city's discretion to convey the city's message. No further constitutional inquiry is required to affirm Pleasant Grove's ability to refuse to accept and display Summum's monument.

III. Private Participation Does Not Render Government Speech Private.

That individuals participate in composing the elements of Pleasant Grove's historical message does not undermine the governmental nature of that message. To determine otherwise fails for at least two reasons.

First, it is inconsistent with this Court's jurisprudence. In *Johanns*, the Beef Promotion and Research Order, created by statute, 7 U.S.C. § 2903, was promulgated by the Secretary of Agriculture subject to "notice and public comment" *Id.* at 2903(a). Once adopted, the federal government paid third parties to create and disseminate its "Beef. It's What's for Dinner" message. *Johanns*, 544. at 566-67. In *Rust*, the federal government gave Title X funds to family counseling doctors contingent upon restrictions that prohibited discussion of abortion with their patients, a regulation that is subject to "notice and comment" pursuant to the

Administrative Procedures Act. *See* 58 Fed. Reg. 7455, 1993 WL 13149866 (1993). The regulations were revised based on the public comments received from third party sources. 53 Fed. Reg. 2922, 2931, 1988 WL 276839 (1988). And in the passage of the "Choose Life" plate, the plate was proposed by private individuals and adopted by the Tennessee legislature. *Bredesen*, 441 F.3d at 376. In all three cases, despite private involvement, the speech at issue was deemed governmental. *Johanns*, 544 U.S. at 560; *Rust*, 500 U.S. at 193; *Bredesen*, 441 F.3d at 376.

This is logical. One who adopts a position advocated by another cannot legitimately be said to be speaking on that person's behalf. Likewise, a court's decision derived from legal arguments advanced by counsel cannot be said to be the private opinion of counsel. It is clearly the decision of the court. Taking the suggestions of its citizens, or utilizing non-governmental agencies and businesses to help shape and propagate its message, does not convert the government's message into a private one.

Pleasant Grove allows its residents to assist it in the development of the city's message. Organizations and individuals donate items to be displayed in the city's parks. This does not render the message private, since the city council has final authority over the permanent display of all such items, which must, at minimum, meet the city's requirements and can subsequently be removed by the city at anytime. *See* App. 1h-4h. At most, such donations demonstrate support for Pleasant Grove's message and a communal interest in advancing it. *See Bredesen*, 441 F.3d at 377 ("While it is true that [] voluntary dissemination itself

qualifies as expressive conduct, the government's reliance on private volunteers to express its policies does not create a 'forum' for speech requiring viewpoint neutrality.").

A second problem is that, as a policy matter, converting government speech into private speech merely because private individuals become involved in it has far reaching, adverse consequences. If private participation automatically converts government speech into a forum that requires viewpoint neutrality, the government's ability to advance or support certain public policy goals would be severely undermined. Government could only craft a genuinely government message if it alone was the only one involved with every minute detail necessary to conceive, develop and disseminate the message. And, if a government message was always private speech, whenever private citizens had first suggested the message, they would comment on proposed government action at their peril, rendering their First Amendment right to petition our government into a hollow right indeed, and this Nation's experiment in "self-government" would be seriously undermined.

Such an approach would also have the absurd result that government could only effectively deliver its message, if it were not supported by private citizen involvement. While the government may not involuntarily associate an individual or organization with an undesired message, *Johanns*, 544 U.S. at 568 (Thomas, J., concurring) (*citing Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 513 U.S. 557, 576-77 (1995)), the government can constitu-

tionally use taxpayer funds to advance its goals. *See Rust,* 550 U.S. 173. Yet if private citizen involvement in the development or promotion of the government's message makes it private speech, the government would have to either refuse to involve those who support its goals or else risk compromising its own message.

For example, governments typically produce public service announcements ("PSAs") as components in programs to encourage or discourage private conduct—such as television and radio programs designed to "just say no" to smoking or to unprotected or promiscuous sex, or to encourage continuing education and the like. These PSAs are often privately produced and broadcasted for free. But under the Tenth Circuit's theory of this case, such voluntary private involvement in producing a government PSA would—like the voluntary submission of a donated monument to a park—logically render the government subject to the charge of unlawful viewpoint discrimination, and the government would then be required either to produce PSAs with a contradictory message or to cease producing PSAs at all.

Indeed, this Court has noted this untenable result in *Rust*: A rule that said that government cannot

> "choose[] to fund a program dedicated to advance certain permissible goals, [without] necessarily discourage[ing] alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U. S. C. § 4411(b), it

> was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.

Id. at 194. Likewise, the *Bredesen* court understood that such an approach

> would force the government to produce messages that fight against its policies, or render unconstitutional a large swath of government actions that nearly everyone would consider desirable and legitimate. Government can certainly speak out on public issues supported by a broad consensus, even though individuals have a First Amendment right not to express agreement. For instance, government can distribute pins that say 'Register to Vote,' issue postage stamps during World War II that say 'Win the War,' and sell license plates that say 'Spay or Neuter your Pets.' Citizens clearly have the First Amendment right to oppose such widely-accepted views, but that right cannot conceivably require the government to distribute 'Don't Vote' pins, to issue postage stamps in 1942 that say 'Stop the War,' or to sell license plates that say 'Spaying or Neutering your Pet is Cruel.'

Id. at 378-79. This would seriously undermines the government's ability to pursue legitimate public policy goals.

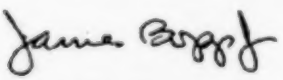
The displays in Pioneer Park serve to convey Pleasant Grove's message. This is an example of the government selectively, but permissibly, enlisting the help of private citizens to convey the city's message

and to assist the city in financing it in a way that this Court has approved. Exclusion of Summum's "The Seven Aphorisms" may likewise be deemed "necessary to define the contours" of the city's scheme, *Velazquez*, 531 U.S. at 547, because allowing the monument in the park is outside of the city's historical purpose.

Conclusion

Because Pleasant Grove is engaged in governmental speech when it approves displays to be placed in its public parks, it may set the requirements for such displays in accordance with its own vision for the parks. The Tenth Circuit decision to the contrary is erroneous and should be reversed.

Respectfully submitted,



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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, *et al.*,

Petitioners,

v.

SUMMUM,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF AMICI CURIAE OF THE JEWISH SOCIAL POLICY ACTION NETWORK, THE JEWISH COUNCIL FOR PUBLIC AFFAIRS AND THE JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

The Jewish Social Policy Action Network ("JSPAN") is a membership organization of American Jews dedicated to protecting the Constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one. In Europe, especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion or worse. Those who emigrated to America in the nineteenth and twentieth centuries found that here one could be both a Jew and an American, a Catholic and an American, even an atheist and an American. JSPAN believes that the gift of church/state separation bestowed on us by the Founding Fathers is essential to all our fundamental freedoms and that therefore great care must be taken that there be no erosion of the separation of church and state principles embodied in the Establishment Clause. JSPAN has filed *amicus curiae* briefs in Establishment Clause cases regularly since it was formed in 2003, and members of JSPAN's Church/State Policy Center have done so in scores of such cases over the past 50 years.

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 14 national and 127 local Jewish

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

community relations organizations, was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake – along with an ethical imperative – in assuring that America remains a country wedded to the Bill of Rights and to the concept of separation of church and state as an essential bulwark for religious freedom in the United States.

The Jewish Alliance for Law and Social Action (JALSA) is a progressive voice within the Jewish community, working on issues of social and economic justice, civil rights, and constitutional liberties. JALSA seeks to end discrimination based on race, ethnicity, gender, sexual orientation, and religion through passage of legislation, court cases, and social action. Members of JALSA have contributed extensively to *amici* briefs in state and federal courts in freedom of religious worship and religious establishment cases, including cases on religious accommodation, prayer in schools, and government entanglement cases.

SUMMARY OF ARGUMENT

Without so much as a nod in the direction of the Establishment Clause, the Tenth Circuit ordered a city to place an arguably religious monument in a public park. For two generations this Court has recognized the neutrality principle, supported by the entire Court in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), that government may not "aid one religion, aid all religions, or prefer one religion over another." The Tenth Circuit's decision is at odds with this Court's long-

standing practice of analyzing under the Establishment Clause the display of monuments on government property to determine whether they constitute either the government's speech or speech bearing government's imprimatur. By wrongly characterizing as "private speech" an earlier monument acquired by the city and then displayed by it in the park, and by wrongly characterizing the park as a "public forum for the display of monuments," the Tenth Circuit's decision undermines the settled neutrality principle of Establishment Clause jurisprudence.

To ensure that the commands of the Establishment Clause continue to be rigorously observed, we ask this Court to reverse the Tenth Circuit's decision. This Court should also make clear that any time a monument with religious content is displayed on government property, the message it conveys must be closely scrutinized under the Establishment Clause to ensure that it is not a message of government advancement of religion or promotion of a specific religion.

ARGUMENT

I. THE TENTH CIRCUIT'S ERRONEOUS PUBLIC FORUM RULING

The Tenth Circuit erroneously concluded that Pleasant Grove's decision to permanently display the Ten Commandments monument in a public park created a public forum for private parties to permanently display other monuments. This conclusion finds no support in the Court's public forum jurisprudence.

This Court has recognized that public parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). But it has never indicated that people have a right to express themselves by permanently and exclusively occupying land that is not theirs. Judge McConnell rightfully noted in his dissent to the Tenth Circuit's denial of a rehearing that while public parks must be open to transitory expression, "neither the logic nor the language of these Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties." *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007).

The Tenth Circuit's characterization of parks as public forums for the erection of permanent monuments has unsettling implications. It implies, for example, that if a city displays a Holocaust memorial in a park, it can be compelled to allow a display glorifying the Nazis.

Public parks are often forums for people to express unpopular and dissenting views, including religious views, but they are not traditionally forums in which governments invite the public to express its views through the erection of permanent fixtures, and Pleasant Grove surely did not do so.[2] The Tenth Circuit's

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[2] By contrast, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) involved a display in a traditional or designated public forum, publicly announced and open to all on equal terms.

conclusion that Pleasant Grove did so here by implication, i.e. by its mere acceptance and display of the Ten Commandments monument, violates this Court's teaching in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), and its progeny.

II. THE TENTH CIRCUIT'S ERRONEOUS PRIVATE SPEECH RULING

The Tenth Circuit also erroneously concluded that the Ten Commandments monument donated to Pleasant Grove by the Fraternal Order of Eagles ("Eagles") remained the private speech of the Eagles. This defies logic and common sense. It is not private speech for the obvious reason that the Eagles no longer own the monument.[3] Moreover, the continued display of the Eagles' monument has involved and will involve governmental action at several critical steps which distinguishes it from private speech occurring on public property. First, Pleasant Grove made the initial decision to accept the monument and to display it. Second, as the owner of the monument, the government now has the discretionary power to alter its content, to place it somewhere else or even remove it from public display.

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[3] Once gifted to the city and accepted by it, the monument was no longer the donor's monument and therefore could no longer be the donor's speech. *See Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1048-49 (2d Cir. 1988) ("In this case the speaker is the United States Government. . . . Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to the GSA; if he wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for sale of his work.")

This is nothing like a decision to allow private parties to express their personal views in a public forum for here the government has at all times exercised complete control over the content of speech being permanently displayed on its property. Presumably that is also why both the majority and minority of this Court in *Van Orden v. Perry*, 545 U.S. 677 (2005), having concluded that the Ten Commandments monument donated to the State of Texas was the *state's* display, analyzed the case not pursuant to Free Speech principles but in accordance with their respective views of what the Establishment Clause requires.

Contrary to the Tenth Circuit's reasoning, the Ten Commandments monument in this case – owned by the city and placed on ground owned by the city –has nothing in common with private speech occurring in a traditional public forum. In effect, the Tenth Circuit equated display of the monument with a rally by a group of people in a public park. The speech of autonomous demonstrators on the city's property is "private speech" occurring in a true public forum. Not so in the case *sub judice*. The city, having accepted the gift of the monument, at all times thereafter exercised complete control over the "speech" permanently occupying its premises.

III. THE TENTH CIRCUIT'S DECISION THREATENS TO UNDERMINE THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

While the Tenth Circuit's decision was based on an erroneous free speech analysis and must therefore be reversed, it is also a fact that the Tenth Circuit panel, supported by three other en banc judges, ordered that the city *must* place an arguably religious monument on public property, and did so without any consideration whatever of the Establishment Clause implications of that Order. Such a result has disquieting implications for Establishment Clause jurisprudence.

The panel did not explain why it ignored the Establishment Clause implications of its Order. Apparently because of its mistaken belief that both monuments constituted "private speech in a public forum" the panel concluded that, religious or not, the City's rights regarding the monuments were limited to time, place and manner restrictions. But in this case that result would be flatly at odds with longstanding Supreme Court authority that religious monuments must always be subject to rigorous Establishment Clause scrutiny whenever government exercises control over the monuments being displayed.

In that regard, it matters not whether the government has exercised its control by selecting the speech being displayed, or whether the displays were always owned by the government, *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (crèche purchased by city); *McCreary v. ACLU*, 545 U.S. 844, 851-53 (2005) (display

created by county governments), or whether government designated a private party to create a display, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 579, 587 (1989) (county permitted the Holy Name Society to display a crèche in county courthouse and city placed a menorah owned by Chabad at entrance to government building), or whether, as here, the display was donated to the government, *Van Orden v. Perry*, 545 U.S. 677 (2005) (Breyer, J., concurring) (Ten Commandments monument donated by Fraternal Order of Eagles). This Court has gone beyond simple ownership issues and routinely analyzed under the Establishment Clause speech by non-governmental actors when it occurs on government property under circumstances implicating the government's possible imprimatur, either when government controls access to the forum or the contents of the message. *See, e.g., Santa Fe ISD v. Doe*, 530 U.S. 290 (2000) (student-led prayer at high school football game where school officials closely controlled access to the forum); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation ceremony where school officials controlled the program). All the various ways of exerting control require close Establishment Clause scrutiny over the display of monuments with religious content on public property.

The Tenth Circuit, however, would apply an entirely different Establishment Clause analysis to a religious monument donated by a private party to the government. As already noted, it would treat these monuments as "private speech" whose content government may not control even *after* a transfer of ownership and control of the monument has been

completed. This novel approach, however, cannot immunize these monuments from Establishment Clause review. To the contrary, it merely provides one more reason why ignoring the change in ownership is profoundly wrong, viz., that the perverse result of doing so is that the city ends up with *two* religious permanent displays on its property, neither one of which has undergone *any* Establishment Clause scrutiny.

An earlier Tenth Circuit decision concerning a Summum attempt to have one of its monuments displayed exemplifies how the Tenth Circuit's approach threatens to water down the rigor of this Court's Establishment Clause jurisprudence. *Summum v. Ogden*, 297 F.3d 995 (10th Cir. 2002). In that case, too, the City of Ogden had displayed a Ten Commandments monument donated to it by the Fraternal Order of the Eagles. As in the present case, the Tenth Circuit concluded that the city's refusal to also display the Summum monument constituted unlawful viewpoint discrimination against Summum's speech. But most importantly for present purposes, unlike Pleasant Grove the City of Ogden defended on the ground that displaying the Summum monument in a public park would violate the Establishment Clause. The Tenth Circuit rejected that defense, characterized the donated religious monuments – as here – as private speech, and concluded that reasonable observers would not likely perceive the monuments as bearing the government's imprimatur. *Ogden*, 297 F.3d at 1011.

Concededly, a government could choose to create a public forum for the erection of permanent displays. In that case, the displays might fairly be characterized as

private speech and the question would be whether reasonable observers would perceive any religious displays as bearing the government's imprimatur. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). But even in such a context, permanent displays might very well be perceived as bearing the government's imprimatur and thus be in violation of the Establishment Clause. For while private speech occurring briefly in a public forum – say a two hour rally in a park by a religious group – is unlikely to be viewed as bearing the government's imprimatur, private speech that is left for long stretches of time or is permanently placed on government property is much more likely to be understood as bearing government's implied endorsement.

Even when government has created a true public forum, "publicly announced and open to all on equal terms," *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Scalia, J.), the Establishment Clause will be implicated if reasonable observers would not be able to understand that the speech is truly private and in no way bears the government's endorsement.

To forestall the confusion likely to be sown in the lower federal courts by the Tenth Circuit's decision, we urge the Court to issue an opinion instructing the lower courts that they should never mandate or authorize the erection or display on government property of a monument with religious content without a rigorous Establishment Clause analysis. Such an analysis is required regardless of whether the monument is owned, erected or maintained by the government or by a private party.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be reversed with instructions to dismiss the complaint. If, however, further proceedings are required, the trial court should be instructed to develop a full record upon which Establishment Clause issues can be evaluated.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, ET AL.,

Petitioners,

v.

SUMMUM,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor.

2. Whether the Tenth Circuit erred by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties.

3. Whether the Tenth Circuit erred by ruling that the city must immediately erect and display Summum's "Seven Aphorisms" monument in the city's park.

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Texas, Virginia and Washington, D.C., and has hundreds of affiliate attorneys in all fifty states. A significant part of Liberty Counsel's work involves representing citizens whose First Amendment rights have been violated.

Liberty Counsel believes there is a significant difference between government and private speech. Denial of the government's right to speak without inviting private parties to speak as well, especially in a permanent way, such as the inclusion of a permanent monument sought by Respondent, significantly undermines the distinction between government and private speech. It is critically important that the government's right to speak and endorse only those messages with which it agrees not be sacrificed or undermined by equating private and government speech.

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[1] Liberty Counsel files this brief with the consent of all parties. Both Petitioner and Respondent have a consent letter on file with this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae or its counsel made a monetary contribution to the preparation and submission of this brief.

Liberty Counsel does not endorse the idea that the government should be able to place prior restraints on private speech by permitting some private speech and not other private speech. However, Liberty Counsel supports governments' rights to create and adopt a message without being required to allow every private party that disagrees with that message to speak, especially when such private speech is permanent. Liberty Counsel is extremely concerned about the effects this case could have in stifling government speech, opening traditionally nonpublic fora to private speech and adversely affecting the esthetics of traditional public fora. Liberty Counsel, therefore, seeks to ensure that this Court has the information necessary to review this case in the broader context.

SUMMARY OF ARGUMENT

This case does not implicate the First Amendment. It is about the government's right to speak without inviting the multitudes into the same forum to counter the government's message. The implications of this case are far reaching, and affirming the decision of the Tenth Circuit will rescind cases regarding everything from the law of tax and property, as they relate to gifts, to Free Speech and Establishment Clause issues.

The displays and monuments are owned by Pleasant Grove City. Once the displays and monuments

were donated to the City and the City accepted them, the displays were no longer the property of private citizens or organizations. The City could remove, modify, remake, or sell the displays as it pleased. The speech emanating from the displays is therefore manifestly government speech, not private speech.

Pleasant Grove's mere acceptance of privately donated displays did not cause the City to establish a public forum for a cacophony of competing and conflicting private messages. In the absence of a public forum for permanent private displays, private persons may not force the government to accept their monuments.

The Tenth Circuit did not give due weight to the distinction between temporary and permanent displays. The difference between a temporary and a permanent display is significant. Permanent displays carry the indicia of government speech. Here the displays and monuments in Pioneer Park are permanent, not temporary. It is inconceivable that Pleasant Grove City would have created a forum for permanent private speech. Under the facts of this case, the displays are government speech. Therefore, the First Amendment is not implicated and Summum cannot contend that the City must be forced to accept its display.

The Tenth Circuit's decision contorts the First Amendment and turns this Court's precedent on its head. If the Tenth Circuit's decision is not reversed, every time the government accepts ownership of a

donated or discounted display and erects that display, the government will be required to open its parks as a dumping ground for private displays. The result is absurd. If the government is forced to accept a flood of conflicting messages every time it displays its own donated or discounted display, the government will become mute. The Statute of Liberty would need to make room for the Statue of Tyranny or perhaps a statue of Stalin or Hitler.

While this case has profound implications, and, if not properly decided could wreck the First Amendment, the resolution is quite simple. The displays and monuments are owned by Pleasant Grove City, and thus the speech is government speech, not private speech. There is no public forum for permanent displays by private persons. Thus, a private speaker may not force the government to accept its display where the government did not open a public forum for such displays.

This Court should reverse the decision of the Tenth Circuit and uphold this Court's longstanding precedent.

ARGUMENT

I. THE GOVERNMENT IS THE OWNER OF THE MONUMENTS IN THE PARK AND IS THEREFORE ALSO THE SPEAKER OF ANY MESSAGES THE MONUMENTS CONVEY.

Pleasant Grove City procured ownership of a number of displays and monuments through donations by private parties.[2] The City elected to place the displays and monuments in Pioneer Park, and upon that decision, the gifts were effected. Pleasant Grove City exercised its discretion of whether to accept the donations, where to place the displays, and at all times remained free to remove, destroy, modify, remake, and sell the monuments and displays.[3] These indicia of ownership inevitably lead to the conclusion that the messages conveyed by these displays and monuments belong to the City.

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[2] In Pioneer Park there are 11 displays and monuments. These include: Old Bell School (oldest known school building in Utah); First City Hall (original Pleasant Grove Town Hall); Pioneer Winter Corral (historic winter sheepfold); First Fire Station (facade of city's first fire station with plaque); Nauvoo Temple Stone (artifact from Mormon Temple in Nauvoo, Illinois); Pioneer Log Cabin (replica, built in 1930); Pioneer Water Well (donated by Lions Club in 1946); Pioneer Granary (built in 1874 donated by Nelson family); Ten Commandments Monument (donated by Fraternal Order of Eagles in 1971); September 11 Monument (project of local Boy Scouts); and Pioneer Flour Mill Stone (used in first flour mill in town, donated by Joe Davis).

[3] The words "displays" and "monuments" will be used interchangeably to connote the same objects.

A. The Monuments In The City Park Are Owned By The City Based On The Concept Of Transfer Of Property By Gift.

This Court, in 1994, referred to the common-law principle of a gift as the "bilateral transaction, requiring not only a donor's intent to give, but also a donee's acceptance." *U.S. v. Irvine*, 511 U.S. 224, 239 (1994). In *Irvine,* the beneficiaries of a trust sought a refund of gift taxes and interest paid on what the Internal Revenue Service determined was a gratuitous transfer. *Id.* at 224. In determining that "a remainder interest in a trust is subject to federal gift taxation when the creation of the interest . . . occurred before enactment of the gift tax," this Court analyzed "the transfer of property by gift" under 26 U.S.C.§ 2501(a) (2004), citing the common-law principle of gifts, as stated above, as a bilateral transaction, which once effected, extinguishes the donor's rights to the property. *Irvine,* 511 U.S. at 224, 232.

Here, like in *Irvine*, a bilateral transaction was made. The Fraternal Order of the Eagles intended to give the Ten Commandments monument to Pleasant Grove City, relinquishing all control over and interest in the monument, and the City accepted the gift. However, not only was there an intent to transfer and acceptance, but the actual transfer was effected, meaning the City now has actual possession of the monument. To find that the monuments in Pioneer Park are not government-owned would upset the concept of gifts in tax and property law. Since the City is the owner of the monuments, any messages

conveyed on the monuments are not the speech of the donors, but rather the speech of the current owner, the City.

B. The City's Ownership Of The Monuments Is Evident Based On The City's Control Of The Monuments And The City's Subsequent Ability To Remove, Destroy, Modify, Remake, And Sell The Monuments.

When a City has control over monuments that were donated to the City and have been placed on City property, the City is the owner of those monuments. *Summum v. Pleasant Grove City,* 499 F.3d 1170, 1177 (10th Cir. 2007) (McConnell, J., dissenting) (citing *Serra v. U.S. General Servs. Admin.,* 847 F.2d 1045, 1049 (2d Cir. 1988) (holding that when an artist donates or sells a piece of art to the government for public display, the artist loses control over the artwork). In this case, the Tenth Circuit erred in failing to recognize the monuments are government owned monuments that convey governmental speech, and subsequently erred in conducting a First Amendment analysis under strict scrutiny. *Summum*, 499 F.3d at 1050.

This rule of law is evident based on *Summum, Serra*, and, additionally, can be inferred from this Court's decision in *Van Orden v. Perry,* 545 U.S. 677 (2005), in which this Court found that the monument on Texas State Capitol grounds did not violate the Establishment Clause of the First Amendment. The

monument in *Van Orden* is very similar to one of the monuments displayed in Pioneer Park, and in fact, the monument in *Van Orden* and one of the monuments in Pioneer Park were both donated by the Fraternal Order of Eagles. *Id.* By conducting an Establishment Clause analysis in *Van Orden*, this Court implied that the government owned the Texas Display and that the message on the display was government speech. It follows that this Court should find that the monuments in Pioneer Park are government-owned and the messages on those monuments are government speech.

The City's control of the displays in the park are not only evident based on the nature of their receipt, being by gift or donation, but also because the City has the ability to sell property donated to the City and gain a profit from that sale. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005). *Mercier* is another case with a fact pattern very similar to this case. In *Mercier,* a private organization, the Fraternal Order of Eagles, offered a monument to the City of La Crosse, Wisconsin, which accepted the monument and displayed it on land owned by the City. Later, the display of the monument was challenged, and the City subsequently *sold* the monument and the land under the monument to the Fraternal Order of Eagles. *Id.* at 696-97.

Here, the same organization, the Fraternal Order of Eagles, donated one of the monuments in Pioneer Park. Pleasant Grove City has the same ownership rights as the City of La Crosse in *Mercier,* meaning,

just as easily as Pleasant Grove City accepted the monument donated by the Fraternal Order of Eagles and the message it conveys, the City can remove, modify, remake, or sell that monument and all of the other monuments similarly donated.

Not only does the City own and control these monuments, but the City's control of the monuments points to the conclusion that the messages on the monuments are government speech, because when a government controls speech, the speech becomes government speech. *Johanns v. Livestock Marketing Association, et al.*, 544 U.S. 550, 560 (2005). *Johanns* is a case regarding the funding of advertisements for beef. *Id.* at 550. In *Johanns*, the Respondent, understanding that the government may generally speak to "advocate and defend its own policies," attempted to convince this Court that the beef advertisements, made under the supervision and approval of the federal Government, were not "government speech." *Id.* at 559-60 (quoting *Board of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 229 (2000)). This Court in *Johanns* declined to address the contention that the government was not the speaker, stating "[t]he message of the promotional campaigns is effectively controlled by the Federal Government itself," and that "the Government's own speech . . . is exempt from First Amendment Scrutiny." *Id.* at 553, 560. This Court determined that because the government controlled the promotional campaigns, which was evident to this Court based upon the Secretary of Agriculture's ability to supervise and

approve the promotional campaigns, the promotional campaigns were government speech. *Id.* at 560.

In this case, the same type of analysis should be conducted regarding the monuments' conveyance of government speech. Here, the City is in control of the monuments. Whether the monuments or artifacts in the public park (City owned property) were initially donated by a local family, the local Boy Scouts, or the Fraternal Order of Eagles, the monuments and artifacts are now under the control of the City, which, accordingly, is now responsible for the up-keep of the displays, as well as the up-keep of the area surrounding them. Therefore, through the City's control of the monuments, the City's ownership of the monuments and the messages inscribed thereon is apparent.

C. The City's Ownership Of The Monuments Is Evident Based On The Nature And Location Of The Displays.

"An unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands."[4] *Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753,

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[4] Justice Souter's concurrence refers to the Ku Klux Klan's willingness to display a disclaimer on the cross noting its private ownership. However, the plurality, based on the reasonable observer's understanding that it was a common practice for private individuals to erect temporary displays (without private ownership disclaimers) on Capitol Square, held that the Latin cross was permissible without a disclaimer. *Id.* at 753.

786 (1995) (Souter, J., concurring). *Capitol Square* is a case in which the plurality determined it was permissible for the Ku Klux Klan to *temporarily* display a Latin cross on state capitol grounds when the property had been opened to the public for speech, and permission was granted based on the same terms required of other private groups that had previously been granted permission to erect *temporary* displays. *Id.* at 763.

In Pioneer Park, none of the displays or monuments indicate that they are privately owned. In fact, the precedent set in Pleasant Grove City, requires private parties wanting to erect a display to gift their displays to the City, allowing the City to decide whether to accept the display and along with it, any message the display conveys. Pleasant Grove City accepted the displays and monuments in Pioneer Park with the understanding that the City owned the displays and adopted any messages the displays convey. *Id.*

The City accepted the displays and monuments as gifts from private donors, has controlled the displays and monuments, and has taken the responsibility for their up-keep. The displays and monuments stand on City-owned property. They are permanent, meaning the length of time they will be displayed rests solely within the discretion of the City. Just like a statue or a historical sign erected by a city in its park, the displays in Pioneer Park are commonly understood to be government, not private, displays.

Thus, any messages conveyed on the displays and monuments are the speech of Pleasant Grove City.

II. WHEN THE GOVERNMENT SPEAKS IN A FORUM, THAT FORUM IS NOT AUTOMATICALLY OPENED TO PRIVATE SPEECH.

The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated. *Adderley v. State of Florida*, 385 U.S. 39, 47 (1967). In *Adderley*, student demonstrators entered jail grounds, property owned by the public, to hold protests. *Id.* at 39. The demonstrators were asked by the sheriff to disperse, but they did not. The demonstrators were then arrested and subsequently convicted of trespassing. *Id.* This Court held in *Adderley* that "The United States Constitution does not forbid a State to control the use of its own property for its own nondiscriminatory purpose." *Id.* at 48.

Here, as in *Adderley*, Pleasant Grove City uses a portion of Pioneer Park for the specific purpose of displaying City-owned monuments and artifacts that portray the Mormon pioneer-era heritage of Pleasant Grove, the established community tie of local civic groups to the City, or both. Because Summum did not meet the criteria set by the City, the monument was not accepted.

In not allowing Summum, a private party, to erect its private monument in Pioneer Park, the City simply followed a policy enacted to preserve the

property for the nondiscriminatory use to which it is dedicated – to share the history of Pleasant Grove City with park-goers. The display of the historic monuments and artifacts is government speech, and when a government speaks, or conveys a message in its own voice, as Pleasant Grove did here, the government has no obligation to provide an equivalent platform for private speech.

A. Pleasant Grove City Has Not Created A Forum For Permanent Private Displays.

Generally, parks and sidewalks are considered traditional public fora; however, this broad concept does have restrictions. *U.S. v. Kokinda,* 497 U.S. 720 (1990). In *Kokinda*, this Court determined that a sidewalk next to a post office was not a traditional public forum because the sidewalk had not been dedicated to First Amendment activity, and that under such circumstances, regulation is examined only for its reasonableness. *Id.* at 726-27.

Here, as in *Kokinda*, public property has been set aside for a specific purpose. Therefore, though the park is a forum open to temporary speech, Pioneer Park has not been opened for the unattended display of private expression. The displays currently in Pioneer Park serve the purpose of reminding the citizens and visitors of Pleasant Grove City of the history of the City. Hence, though Pioneer Park, like many other parks throughout the United States, is open to the public and individuals' active private

expression, it is not open to the public's *permanent* expression.

On Ellis Island, in New York, rests the Statue of Liberty, donated to the United States by France and dedicated on October 28, 1886.[5] The entrance of Putnam Memorial State Park, in Connecticut, contains an equestrian statue of General Israel Putnam, donated by Anna Hyatt Huntington.[6] The National Mall also contains a variety of displays, including the World War II Memorial and Vietnam Veterans Memorial, both designed by private individuals, and several memorials honoring past presidents.[7] The acceptance of these statues and memorials did not open these public parks for private parties to erect permanent monuments such as a Statue of Tyranny on Ellis Island, former Queen of England, Victoria Mary Adelaide in Putnam Memorial State Park, or statues of Osama Bin Laden or Adolf Hitler in the National Mall. Similarly, Pleasant Grove City's acceptance of the displays in Pioneer Park does not open the park for Summum's display of its Seven Aphorisms.

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[5] Statue of Liberty National Monument: History and Culture, http://www.nps.gov/stli/historyculture (last visited June 17, 2008).

[6] Putnam Memorial State Park, http://en.wikipedia.org/wiki/Putnam_Memorial_State_Park (last visited June 17, 2008).

[7] National Mall and Memorial Parks, http://www.nps.gov/nama (last visited June 17, 2008).

B. In The Absence Of A Public Forum, The Government May Refuse, Adopt, Accept, Or Endorse Private Speech.

In 1959, Ohio adopted a state motto, suggested by a 12 year old Cincinnati boy, James Mastronardo. Not wanting Ohio to be one of only two states without an official motto, James submitted a proposed motto in a contest sponsored by the Ohio legislature.[8] In 1959, "With God, all things are possible" was adopted as the official motto of the State of Ohio. Ohio Rev. Code Ann. § 5.06 (1959). Ohio's adoption of James' suggestion did not compel Ohio to adopt other suggestions.

Twenty-seven legislators and twelve percent of the population opposed the motto. T. Melindah Bush, *The Ohio State Motto Survives the Establishment Clause*, 64 OHIO ST. L. J. 585, 611 (2003). This opposition did not result in a requirement that Ohio accept a motto from one of the twenty-seven legislators or twelve percent of Ohioans who did not agree with the motto. Rather, the State of Ohio was able to both accept private submissions and adopt one proposed motto as its own while rejecting the rest. This is precisely what Pleasant Grove City should be permitted to do under the facts here.

This Court has previously stated that "[o]bliging people to 'use their private property as a 'mobile

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[8] "Ohio's State Motto." Ohio History Central. July 1, 2005, http://www.ohiohistorycentral.org/entry.php?rec+1885.

billboard' for the State's ideological message' amounted to impermissible compelled expression." *Johanns v. Livestock Marketing Association,* 544 U.S. 550, 557 (2005) (citing *Wooley v. Maynard,* 430 U.S. 705, 715 (1977) (holding the New Hampshire requirement that individuals' license plates displaying the State's motto, "Live Free or Die," amounted to impermissible compelled expression)). *Johanns* held that advertisements promoting beef were government speech, and that therefore the government did not compel private expression. 544 U.S. at 550. However, though recognizing that government speech is not protected by the First Amendment as is private speech, the government, like a private person, should be protected from the type of compelled speech that would require Ohio to adopt an additional motto, or Pleasant Grove City to accept and display monuments that contain messages with which the City does not agree.

This Court should find that Pleasant Grove City has the right to refuse, adopt, accept, and endorse private speech when the government is speaking in a forum that is not open to similar private expression. When a city is forced to adopt a monument or display, the city also adopts any messages on the display or monument, and any liability that is associated with the monument or display; therefore, it should be up to the city to decide whether it wants to adopt that message and any liability that should arise from the government's association with that message.

C. The Tenth Circuit Erred In Failing To Recognize A Distinction Between Permanent And Temporary Speech.

Pioneer Park has not been designated as a forum for the erection of privately-sponsored temporary or permanent stand-alone displays. While some public parks permit privately-sponsored temporary displays, it is inconceivable that a public park would permit privately-sponsored permanent displays. The difference between a temporary and a permanent display is significant. Whether the mode of speech is communicated verbally, through the distribution of leaflets, picket signs, demonstrations, or seasonal or topical displays, private speech universally has one thing in common – it is temporary. Permanent displays carry the indicia of government speech.

Privately-sponsored seasonal or topical displays on public property are categorized as temporary because they, last, exist, or continue for a limited time. Webster's Third New International Dictionary of the English Language Unabridged 2353 (2002). This limited time may consist of a day, a week, or in some cases, a holiday season. If this Court were to follow the Tenth Circuit and allow permanent private monuments that are on display twenty-four hours a day, seven days a week, and three hundred and sixty-five days a year to be displayed on government property, the result would, in effect, redefine the purpose of a traditional public forum, a forum generally used for active communication, rather than for the purpose of dumping large, unattended, private displays.

Additionally, there are two other primary reasons why governments have an interest in banning permanent private displays on public property. First, the permanent private displays may lead to the visual clutter of public places like Pioneer Park, and second, when one individual or entity uses public space in a permanent way, no other individual can use that space to exercise First Amendment rights. *See Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789 (1984); *Hague v. Committee for Industrial Organization,* 307 U.S. 496 (1939).

1. Permitting permanent private displays on public property will disrupt the esthetics and create clutter in parks throughout the United States.

A City's purpose of eliminating visual clutter by not allowing private persons to display *permanent monuments* is justified and is certainly reasonable. *See Taxpayers for Vincent,* 466 U.S. at 808. In *Taxpayers for Vincent,* an action was brought seeking an injunction against enforcement of an ordinance prohibiting the posting of signs on public property. *Id.* at 789. The ordinance forbade affixing signs to government property, for example, telephone poles, public bridges, drinking fountains, trees, and traffic signs. *Id.* at 792.

Though "the esthetic interest in preventing the kind of litter that may result from the distribution of

leaflets on the public streets and sidewalks cannot support a prophylactic prohibition against the citizen's exercise of that method of expressing his views," this Court distinguished "individual citizens [that] were actively exercising their right to communicate directly with potential recipients of their message ([when] the conduct continued only while the speakers or distributors remained on the scene), [from the placement of] signs throughout an area where they would remain unattended until removed." *Id.* at 808-09.

Here, as in *Taxpayers for Vincent,* this Court must grant the City the opportunity to consider the esthetics of Pioneer Park as the City makes decisions about what types of displays may and may not be permitted on City property. Additionally, the City must be able to consider the interests of each individual, the entire public, in the City-owned property that a private display would consume.

2. Permitting one private individual to put a permanent monument on public property will inevitably inhibit the First Amendment rights of others.

Public fora cannot be opened to the permanent speech of one individual because, by their nature, they are intended to be open to the entire public "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Industrial Organization,* 307

U.S. 496, 515 (1939). In a challenge to enjoin Jersey City from interfering with plaintiffs' rights to speak and assemble freely, this Court stated that "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all." *Id.* at 515-16.

Therefore, to determine that private parties have a fundamental right to drop permanent monuments and displays in the backyard of the government would nullify this Court's established precedent. Affirming the holding of the Tenth Circuit would defeat the concept of public fora, and the purpose of public parks, inevitably granting some more access to the parks, and opportunities to speak in them, than others. This is partially because it would be impossible for all private parties of Pleasant Grove City to permanently speak in Pioneer Park, and partially because, in Pleasant Grove and throughout the country, green parks would be replaced with a plethora of monuments conveying a variety of messages. Therefore, this Court should reverse this decision below and find that the messages on the displays in Pioneer Park are not the speech of private individuals, and that private individuals may not place permanent monuments in the City-owned park.

D. When The Government Speaks On Government Property, That Property Is Not Automatically Opened To Private Individuals To Speak.

This Court, in *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), "announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property." *U.S. v. Kokinda*, 497 U.S. 720, 726 (1990) (holding that a postal sidewalk was not a traditional public forum). Upholding the Tenth Circuit's decision would undermine the public forum doctrine and create confusion. It simply does not make sense to suggest that whenever the government speaks, private parties were due their turn to speak as well. Public schools and other fora where the government, or agents of the government, generally speak could no longer be closed or controlled if the Tenth Circuit's decision is affirmed. In fact, if this Court finds for Respondent, whenever a teacher cites disapproval of smoking, she will be required to open her classroom to private speakers with opposing messages.

Additionally, fora classified as designated or limited fora would require new classification, because, following the Tenth Circuit's rationale, a government could not open a forum to allow itself to speak, then close the forum. As Petitioner stated in the appeal, everyone would want their turn to speak, and when private individuals want to speak through the government permanently, like Summum here, the

City would be charged with the expense of placing and replacing the monuments. Therefore, this Court should find that private parties should not be permitted to speak whenever and however the government speaks.

E. The Government Has The Right To Preferred Messages.

This Court has illustrated the concept of the government's right to preferred messages by holding that Congress can choose to fund one activity to the exclusion of another. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). In *Rust*, individuals challenged a law that did not allow funds allocated for family planning clinics to be dispersed to family planning services that could use the funds "in programs where abortion is a method of family planning." *Id.* at 195.

This Court found that it was permissible for the government to prefer traditional counseling regarding family planning to the exclusion of abortion counseling because counseling on abortion was simply outside of the scope of the project. *Id.* at 194-95. This analysis can also be applied here. The Pioneer Park displays include only monuments and artifacts that portray the Mormon pioneer-era heritage of Pleasant Grove, the established community tie of local civic groups to the City, or both. It is outside of the scope of the project of Pleasant Grove City to incorporate the Seven Aphorisms of Summum, an organization that does not even have a local chapter or office.

Therefore, like in *Rust*, it is permissible for the government to prefer and display messages regarding Pleasant Grove City's history and civic organizations.

Additionally, the Departments of Health of a number of different states have engaged in anti-smoking campaigns.[9] In fact, in Missouri, in 1999, a group called Project ASSIST (American Stop Smoking Intervention Study), which was sponsored by the Missouri Department of Health and the Kansas City Health Department, helped to select anti-smoking messages that were displayed on billboards throughout the state of Missouri.[10] State governments were able to engage in these anti-smoking campaigns because they have a right to preferred messages.

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[9] *See* New York City Department of Health and Mental Hygiene, Bureau of Tobacco Control, available at http://www.nyc.gov/html/doh/html/smoke/smoke1.shtml (last visited June 13, 2008); *News from the Washington State Department of Health, Tobacco Prevention and Control Program*, Washington State Department of Health, June 27, 2001; Print Media Campaign, Department of Health – State of Hawaii, available at http://hawaii.gov/health/health-lifestyles/tobacco/media/printmedia.htm (last visited June 12, 2008); Press Release, California Department of Health Services, *California Releases New Data and Anti-smoking Ads Targeting Diverse Populations: Ads Break New Ground on Dangers of Drifting Secondhand Smoke in Apartments* (October 2, 2006).

[10] Press Release, Missouri Attorney General Jay Nixon, *Nixon, Anti-smoking Groups and Health Leaders Launch Anti-tobacco Billboard Campaign* (April 7, 1999), available at http://ago.mo.gov/newsreleases/1999/4799.htm.

Were a private party to donate the funds to the Departments of Health for the display of billboards such as those in Missouri, or were a private individual to donate the billboards themselves to the government, the State, upon accepting the funds or billboards, would not then be required to display a pro-smoking message. The same is true in this case, where private parties donated historic and civic displays to the government. Just as would be the case regarding the government's anti-smoking message, acceptance of the displays here, did not cause Pleasant Grove City to be required to accept all monuments and displays, and the City is especially not required to accept monuments and displays that are not relevant to the City's purpose in accepting any monuments.

III. THE CONSEQUENCES OF THIS COURT'S RULING WILL HAVE FAR-REACHING EFFECTS ON FREE SPEECH RIGHTS.

The potential reach of this case goes far beyond a park in Pleasant Grove City, Utah. This Court's decision could dramatically affect the First Amendment. Adoption of Respondent's proposed approach to government speech and permanent private speech in traditional public fora would collapse established concepts of tax and property law and free speech, and create confusion throughout the judicial system and even the State and National Parks Services.

Cities that do not require individuals to have permits to speak in public places could become the dumping ground for permanent private expression, likely causing local governments throughout the country to implement prior restraints and other efforts that would impede temporary speech, speech that would otherwise be protected by the First Amendment.

Government-owned memorials erected for the purpose of honoring soldiers who served faithfully and honorably in war throughout the history of the United States of America could be overshadowed by permanent monuments with opposing messages, honoring the Redcoats, Adolf Hitler and his Nazis, Joseph Stalin, Saddam Hussein, Fidel Castro, or Osama Bin Laden, causing the government to appear to contradict its own message.

If the government would have to allow a cacophony of competing and conflicting private voices every time it spoke through a donated or discounted display which it owned and controlled, then the government would become mute. Government expression would cease. The Tenth Circuit's decision is a recipe for chaos.

The government's acceptance of a monument and its message yields government speech, and when the government speaks in a permanent way on government property, that property is not automatically opened for every private individual to place

a permanent monument on the same government property in the name of free speech.

CONCLUSION

The Tenth Circuit incorrectly decided that when a government accepts a donated monument and places that monument on the property of the government, that the message contained on the monument is not government speech. In the interest of preserving the governments' opportunities to convey important messages to the people they represent, this Court must reverse the decision of the Tenth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

(31) June 23, 08

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No. 07-665

In The

Supreme Court of the United States

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PLEASANT GROVE CITY, JIM DANKLEF, MARK ATWOOD, CINDY BOYD, MIKE DANIELS, DAROLD MCDADE, JEFF WILSON, CAROL HARMER, G. KEITH CORRY, FRANK MILLS,

Petitioners,

v.

SUMMUM, a corporate sole and church,

Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION, in support of the Petitioners.

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a 501(c)(3) public interest law firm organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are particularly interested in assuring that constitutional case law not be misapplied by forcing local governments to permit the haphazard erection of permanent monuments in city parks.[1]

SUMMARY OF THE ARGUMENT

This Brief makes two arguments not made by the party it supports. Pleasnt Grove argues, and your *Amicus* agrees, that the monuments in the Park are government speech. However, Pleasant Grove also argues that should this Court decide that donated monuments remain the private speech of the donors, the rejection of Summum's monument still passes constitutional muster. *Amicus* agrees with this latter assertion as well. In support of that assertion, Amicus presents the following two arguments. First, your *Amicus* argues that the Tenth Circuit incorrectly considered the Pleasant Grove City Pioneer Park to be a traditional public

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk. No counsel for any party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

forum for the purposes of permanent monuments. Second, your *Amicus* argues that Pleasant Grove's decision not to erect the monument was a reasonable decision under a nonpublic forum analysis.

As to the first point, Pioneer Park is not a traditional public forum for the purpose of establishing permanent public monuments. The Tenth Circuit merely applied a "magic words" test by noting that this Court has characterized streets and parks as quintessential public fora. However, this Court has noted that that generalized rule does not always apply and a particularized analysis must be done. In *United States v. Kokinda*, 497 U.S. 720 (1990), this Court considered the question of whether a sidewalk is always a traditional public forum, and a plurality found that it was not. The majority of Circuit Courts of Appeals have continued to apply this analysis following three of this Court's cases.

Furthermore, as Justice Scalia has noted, this Court should not allow "traditional public forum" to become just a conclusory label. Should this Court affirm the Tenth Circuit's analysis, it would be approving a decision which effectively applied a conclusory label to a city park, thus forcing the Pleasant Grove City to display unwanted donated permanent monuments. If it were to do so, a city that allows a parade in its streets could then be forced to place a permanent monument in the middle of Main Street.

As to the second point, Pleasant Grove City has reasonably chosen not to display a proposed monument which would not fit the reasonable

criteria the City has established for permanent monuments. These criteria are "local ties and historical relevance." This Brief shows that while Summum could try to object to the City's second criteria, historical relevance, as pre-textual viewpoint discrimination, such an objection would be incorrect.

There is a significant historical distinction between the Ten Commandments monument, which the City allowed to be erected, and the Seven Aphorisms of Summum monument, which the City does not want erected. Pioneer Park's theme for the vast majority of its monuments and displays is related to the Mormon pioneers who settled the area and founded Pleasant Grove. To many of those pioneers, the Ten Commandments were an essential part of the moral foundation of their daily lives. The Seven Aphorisms are not a part of that history, and hence the City was reasonable to chose to exclude it from Pioneer Park, and the decision was not just a pretext for viewpoint discrimination.

ARGUMENT

Pleasant Grove City argues that the monuments it chooses to erect in its park constitute government speech, not private speech. (Pet'r Br. 20.) Your *Amicus* agrees. However, Pleasant Grove City also argues that even were this Court to disagree and consider donated monuments to continue to be the speech of the donor, the decision not to display Summum's monument would still pass constitutional muster. Your *Amicus* agrees with this

latter assertion as well and respectfully submits two arguments demonstrating why this is true.

I. THE TENTH CIRCUIT INCORRECTLY CONSIDERED THE CITY'S PARK TO BE A TRADITIONAL PUBLIC FORUM BECAUSE IT DID NOT MAKE A PARTICULARIZED INQUIRY INTO THE CIRCUMSTANCES OF THIS CASE.

The Tenth Circuit found that the Pleasant Grove City Pioneer Park, simply because it is a park, *must* be a traditional public forum for all purposes. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1050 (10th Cir. 2007). Having made this determination, the Court remanded the case to the District Court with instruction to grant a preliminary injunction so that Summum would be allowed to erect their monument in the park. *Id.* at 1057. However, as Pleasant Grove City argued, Pioneer Park is neither a traditional public forum for "private, unattended, permanent monuments," (Pet'r Br. 43) nor is it a designated public forum. (*Id.* at 45.) In addition to the reasons argued by Pleasant Grove City, Pioneer Park is not a traditional public forum for the erection of private, unattended permanent monuments under *United States v. Kokinda*, 497 U.S. 720 (1990), and under the principles discussed by Justice Scalia in his concurrence to *Burson v. Freeman*, 504 U.S. 191 (1992).

The problem with the Tenth Circuit's analysis is that it merely quotes this Court's precedent which has "characterized streets and parks as

'quintessential public forum,'" and ends its analysis on this point. *Summum*, 483 F.3d at 1050 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). However, members of this Court have noted two exceptions to this broad principle. First, individual pieces of government property that typically fall within broad classifications as traditional public fora, do not always function as traditional public fora. Second, an individual piece of property may be a traditional public forum at some times, and not others. Each of these exceptions will be examined below.

As to the first exception, in *Kokinda* two political activists were "solicit[ing] contributions, sell[ing] books and subscriptions to the organization's newspaper, and distribut[ing] literature addressing a variety of political issues" on a sidewalk that connected a post office with its parking lot. 497 U.S. at 723. The pair was subsequently charged with, and convicted of, violating a regulation forbidding those activities on Post Office property. *Id.* at 724. The Fourth Circuit held that "[s]idewalks . . . are presumptively public forums" and thus analyzed the regulation under a time, place, and manner analysis for traditional public fora. *United States v. Kokinda*, 866 F.2d 699, 701, 703 (4th Cir. 1989).

However, the *Kokinda* plurality found that the post office sidewalk was not like the "quintessential public sidewalk" it has addressed in *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). Rather, the *Kokinda* plurality distinguished between external sidewalks that run along the side of the street and

the Post Office's internal sidewalk which only ran between its parking lot and the building. 497 U.S. 727. Therefore, the plurality criticized the *Kokinda* dissent for relying on *Frisby* to "designate *all* sidewalks open to the public as public fora." *Id.* at 727-28 (emphasis added). The plurality explicitly stated that the dissent's out-of-context reliance on *Frisby* was in conflict with this Court's "settled doctrine." *Id.* at 728. The plurality cited *United States* v. *Grace*, 461 U.S. 171 (1983), and *Greer v. Spock*, 424 U.S. 828 (1976) to show how it had engaged in a particularized analyses of sidewalks in the past. *Kokinda*, 497 U.S. at 728-29. The plurality considered the Postal Service's reasons for banning solicitation and agreed that solicitation would be "inherently disruptive of the Postal Service's business." *Id.* at 731-33.

Thus, having decided that a particularized inquiry was required, the plurality found that the post office sidewalk served the limited purpose of providing access from the post office's parking lot to the building, not the purpose of facilitating free speech and thus was not a traditional public forum. *Id.* at 728. Therefore, the government did not have to permit its property to be used as a typical public forum against its wishes. *Id.* at 736.

Because Kokinda was a plurality decision, it is important to note that Justice Kennedy's opinion, which provided the fifth vote for the judgment, clearly embraced a particularized inquiry approach. *Id.* at 738-39 ("If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and

its customary use by the public may control the case.").

All of the Courts of Appeals have correctly applied a "particularized inquiry" following *Kokinda*, *Grace*, and *Greer*. *Preminger v. Sec'y of VA*, 517 F.3d 1299, 1313 (Fed. Cir. 2008); *Bowman v. White*, 444 F.3d 967, 985 (8th Cir. 2006); *Initiative & Referendum Inst. v. United States Postal Serv.*, 417 F.3d 1299, 1313-14 (D.C. Cir. 2005); *Parks v. City of Columbus*, 395 F.3d 643, 648-50 (6th Cir. 2005); *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099-1104 (9th Cir. 2003); *New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20-21 (1st Cir. 2002); *Hotel Employees & Rest. Employees Union, Local 100 of New York, N.Y. & Vicinity v. City Of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 50 (2d Cir. 2002); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1125-26 (10th Cir. 2002); *Vasquez v. Hous. Auth.*, 271 F.3d 198, 203 (5th Cir. 2001); *Warren v. Fairfax County*, 196 F.3d 186, 191-92 (4th Cir. 1999); *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1152 (7th Cir. 1995); *Rappa v. New Castle County*, 18 F.3d 1043, 1071 & n.9 (3d Cir. 1994) (noting that a particularized inquiry was not necessary in the case before it, but acknowledging that such an inquiry would sometimes be required); *Sentinel Comm'ns Co. v. Watts*, 936 F.2d 1189, 1204 (11th Cir. 1991). [2]

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[2] However, sometimes a Court of Appeals may nevertheless apply *Frisby's* generalized rule when it is analyzing an indisputable quintessential traditional public forum, such as an external sidewalk. *See, e.g. Aler v. Armstrong*, 961 F.2d 1224, 1227 (6th Cir. 1992).

Mostly interesting of all the above cases is *First Unitarian Church of Salt Lake City*, 308 F.3d 1125-26. There, the Tenth Circuit realized that a particularized inquiry was required. Yet in the instant case, the Tenth Circuit failed to follow its own binding precedent. *Am. Cas. Co. v. Health Care Indem., Inc.*, 520 F.3d 1131, 1138 (10th Cir. 2008) (noting that one Tenth Circuit panel cannot overturn a decision from another panel.). Rather than engaging in the particularized inquiry required by *First Unitarian Church*, it engaged in a "magic words" analysis: all parks *must always* be a traditional public forum.

In the instant case, the Tenth Circuit should have understood that while Pioneer Park may be a traditional public forum for many purposes, that does not mean that the City can be forced to accept and erect a permanent monument someone may choose to donate. (Pet'r Br. 44.) Just as in *Kokinda*, where the Post Office did not have to permit solicitation on its property solely because it was a sidewalk, so Pleasant Grove City does not have to allow the erection of a permanent monument just because Pioneer Park is a park. Also, just as solicitation would interfere with the Postal Service's intended use of its internal sidewalk (providing ingress and egress), so the forced acceptance and erection of any and every donated monument would interfere with Pleasant Grove City's intention to limit the park's theme. Therefore, this Court, just like the plurality in *Kokinda*, should perform a particularized inquiry and hold that Pioneer Park is not a traditional public forum for the erection of permanent monuments.

The second exception to the general rule governing which governmental properties fall into which category of fora was addressed in Justice Scalia's concurrence in *Burson*, 504 U.S. at 214 (Scalia, J., concurring). He concluded that a restriction on political campaigning within 100 feet of a polling place on election day was reasonable. *Id.* at 216. He concluded this despite that fact that the 100-foot limitation would often encompass both streets and sidewalks. *Id.* at 214. He opined that "[i]f the category of 'traditional public forum' is to be a tool of analysis rather than a conclusory label, it must remain faithful to its name and derive its content from *tradition*." *Id.* (emphasis in original) Justice Scalia went on to reason that "[b]ecause restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, [the statute] does not restrict speech in a traditional public forum . . . ." *Id.* Thus, the streets and sidewalks that fell within the 100-foot limit would be traditional public fora on most days, but they would not be traditional public fora on election day.

This principle should be applied not just in the temporal sense, where what is typically a traditional public forum can at times be a nonpublic forum, but also in a contextual sense, where what is typically a traditional public forum for most speech activities is a nonpublic forum for the placement of a permanent monument. In this case, the government property is a city park, which is typically a traditional public forum. However, that does not mean that anyone should be able to donate a permanent monument and force the City to erect it. The streets and

sidewalks in *Burson*, which were generally a traditional public forum, were not such a forum on election day. 504 U.S. at 216. So here, the Park may typically be a traditional public forum, but it is not such a form for the erection of a permanent monument.

The concurrence in *Burson* reasoned that this Court should not allow "traditional public forum" to become a conclusory label. *Id.* at 215 (Scalia, J., concurring). That principle should also apply in this case, especially where the activity involved is not true speech, literature distribution, or even a temporary display; but rather the forced *permanent* display of a monument on government property. Therefore, this Court should eschew a conclusory label, and recognize that sometimes public fora can change with the circumstances.

If this Court were to accept the lower court's analysis, once a plot of government property has been held to be a traditional public forum, it must be considered as such not only for transient, temporary speech activities, but also for the erection of permanent monuments. To follow this logic to its natural conclusion, if a city had allowed a parade in its streets, it could be forced to place a permanent monument in the middle of Main Street.

II. PLEASANT GROVE'S RESTRICTION IS REASONABLE BECAUSE IT IS A VIEWPOINT-NEUTRAL RESTRICTION UNDER THE NONPUBLIC FORUM ANALYSIS.

As noted above, Pioneer Park is not a traditional public forum for permanent monuments. In addition, Pleasant Grove argues in its brief that Pioneer Park is not a designated public forum. (Pet'r Br. 45.) Therefore, under its belief that its donated monument constitutes private speech, Summum's last available argument could be that the City's restriction is not reasonable under the nonpublic forum doctrine. However, the City has adopted two reasonable criteria for deciding which monuments it will erect in its role as administrator of the park. These criteria are "local ties and historical relevance." (*Id.* at 47.) The Park contains a number of historical buildings and monuments related to the City's Mormon pioneer history. (Pet'r Br. 3-5.) As Pleasant Grove City argued, the first criterion is constitutional, as a speaker identity requirement, and the second is also constitutional as being viewpoint neutral. (*Id.* at 48.) However, Summum could object to the latter criterion as a pre-textual requirement, arguing that the Ten Commandments does not fit within Mormon pioneer history. This Part of the Brief will demonstrate why this argument would be incorrect.

A significant distinction between the Ten Commandments and the Seven Aphorisms of Summum is the historical relevance of the Ten Commandments to the Mormon pioneers who

founded Pleasant Grove City. The historical tradition of the meaning of the Ten Commandments to the Mormon pioneers has been shown by the City's expert at the trial court. Most importantly, he noted that the Mormon pioneers "emphasized the Ten Commandments as fundamental precepts for an orderly society." (Expert Report, *Summum v. Pleasant Grove City*, Case No. 02:05-cv-068-DB, 4 (Dist. Utah April 9, 2007) (District Court Docket Entry No. 231, Ex. A.).) As such, it was something they looked to in building their communities, including Pleasant Grove. (*Id.*)

In fact, a number of the early Mormon pioneer leaders[3] are recorded as stating the importance of the Ten Commandments. The civil and religious leader of the Mormon pioneers during the pioneer period, Brigham Young,[4] explicitly instructed the pioneers to "Keep the Ten Commandments," and referred to the Ten Commandments as "the moral code" to which the pioneers kept. (*Id.* at 5-6.) Other Mormon pioneer leaders also exhorted others to follow the Ten Commandments. For instance, Wilford Woodruff said that "'civilized rule' was based upon 'the moral law—the ten commandments.'" (*Id.*) He also instructed the pioneers to "'teach their children these principles in early youth' to provide a

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[3] While the Expert Report often refers to these men as Apostles, many church officials were also pioneer civil political leaders, including the men quoted above. Klaus J. Hansen, Quest for Empire, 49, 63, 129, 131, 137 (1970).

[4] Brigham Young is a quintessential—but certainly not the only—example of a Mormon leader who held both ecclesiastical and civil office. He was both President of the Mormon Church and first governor of the Territory of Utah. Hansen, *supra* note 2, at 129, 136.

moral foundation." (*Id.* 7.) In fact, one of the pioneer leaders, Heber Kimball, insisted that the Mormon pioneers had a duty to follow the Ten Commandments. (*Id.* at 6). Dr. Brian Cannon, who was utilized as an expert in this case, has said that [i]n trying to establish "civilized rule," or civil government, in Utah, it was natural for the legislature in pioneer Utah to prohibit behavior that was prohibited in the Ten Commandments. The first criminal code for Utah, enacted January 16, 1851, built upon the principles enunciated in the Ten Commandments. (*Id.* at 4-5.)

When the Pleasant Grove Fraternal Order of Eagles offered a monument of the Ten Commandments to the City, the monument fit very well with the theme of the pioneer founders of Pleasant Grove. This fact is clear when considering the other monuments located within the park; these monuments include a number of buildings or structures from the city's founding, artifacts from Mormon history, and other items that related to the Mormon pioneers. (Pet'r Br. 4-5). In fact, Jack Cook, the Mayor of Pleasant Grove City at the time of the dedication of the Ten Commandment monument, stated that "he thought the monument 'would serve to remind citizens of their pioneer heritage in the founding of the state.'" (J.A. 103, ¶10.) As has been shown above, the Ten Commandments were important to the Mormon pioneers, and hence a monument of the Ten Commandments was consistent with the theme of the Park.

The Seven Aphorisms of Summum, unlike the Ten Commandments, have nothing to do with the

Pioneer history of Pleasant Grove. Thus, displaying the latter, while declining to display the former is not a pretext for viewpoint discrimination.

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Petitioners' and other *Amici Curiae* briefs, this Court should reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,
this 23rd day of June, 2008

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

PLEASANT GROVE CITY, UTAH, et al.
Petitioners,

v.

SUMMUM,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor?

2. Did the Tenth Circuit err by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties?

3. Did the Tenth Circuit err by ruling that the city must immediately erect and display Summum's "Seven Aphorisms" monument in the city's park?

INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon, and in educating the public about constitutional and human rights issues.

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[1] Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part.

Attorneys affiliated with the Institute have represented parties and filed *amicus curiae* briefs in this Court on numerous occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between government and citizens.

The Rutherford Institute works to preserve the most basic freedoms of our Republic—in this case, the right of a private party to be heard in a public forum on an equal basis with other private parties, free from unconstitutional viewpoint discrimination.

STATEMENT OF FACTS

Amicus incorporates by reference the statement of facts set forth in the response of Respondent Summum to the Petition for Certiorari.

SUMMARY OF ARGUMENT[2]

Pleasant Grove City contends that when government owns and controls a permanent monument or series of monuments that display private messages on public property, there is no First Amendment right to display competing messages because the displays are "government speech." The City's indiscriminately broad position is, however, belied by the anatomy of the speech in question. What the City ignores is that, "speech in fact can be, at once, that of a private individual *and*

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[2] The argument in this brief is limited to the question of whether a privately donated monument displayed on public property by a municipality is government or private speech.

the government."[3] If the City did, in fact, adopt the private speech engraved on a monument as its own, the First Amendment would presumably not apply in most situations and Summum would arguably have no right to erect its own monument.[4] But if the City did not *expressly* adopt such private speech as its own, it may have engaged in unlawful viewpoint discrimination by favoring one private speaker and denying similar access to another.

Rather than yield to puerile, nonsensical shibboleths such as "the Statue of Liberty does not require a Statue of Tyranny" or facile fear-mongering about "cluttered junkyards of monuments" in the public square,[5] this Court should

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[3] *Sons of Confederate Veterans v. Virginia*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) (emphasis added).

[4] Even "government speech" may be subject to First Amendment scrutiny. "When a legislative majority singles out a minority viewpoint in . . . pointed fashion, free speech values cannot help but be implicated." *Sons of Confederate Veterans*, 305 F.3d at 242 (Wilkinson, C.J., concurring in the denial of rehearing en banc).

[5] The City argues that if Summum is allowed to display its monument, the City will be inundated with requests from other individuals wishing to erect their own monuments. However, "[t]he record contains no evidence to support Pleasant Grove's contention that an injunction in this case will prompt an endless number of applications for permanent displays in the park." *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1056 (10th Cir. 2007). Even if the Petitioner would be so inundated, this *potential* harm to the Petitioner must be weighed against the Respondent's *actual* First Amendment injury. *Id.*

instead respond with caution and careful deliberation. In resolving the difficult issues presented in this case, it is important that precious First Amendment freedoms in public places be protected. To determine what constitutes "government speech" and when—if indeed ever—so-called "government speech" may be restrained by the First Amendment, this Court should establish exacting standards when government grants access to favored private speech, but denies it to others.

Before granting the blanket exemption that Pleasant Grove City seeks from First Amendment viewpoint discrimination proscriptions, it is important to require the City to demonstrate that it did in fact adopt the private messages displayed on the park monuments as its own and to justify that the basis for denying access to other conflicting messages was not viewpoint related. The existing Ten Commandments monument in the city park was designed, constructed, and paid for by the Fraternal Order of Eagles. The record in this case fails to show that the City adopted the Eagles' message as its own. If it did no more than permit the Eagles to display the monument and its message—as reflected in the record—why, indeed, should it rise to the level of "government speech"? In such circumstances, where the City has granted dominant access in a public forum to one private message over another and where it has not clearly demonstrated adoption of the privately promoted message, the City should not, under the guise of "government speech," be exempt from the restraints of First Amendment viewpoint discrimination.

If the City is left free to use a private surrogate to advance a particularly favored message,

the shield of democratic accountability that otherwise underpins the government speech doctrine actually serves as a means of unconstitutional viewpoint discrimination. Moreover, the City's position—that merely granting access to a forum automatically shrouds speech with the protection of the government speech doctrine, "without [the City] necessarily subscribing to the precise messages engraved thereon,"[6]—only proves that it is not, in fact, "government speech" because the message is admittedly not one from government. As such, "government speech" becomes a fiction of law, with dangerous consequences for free speech. This Court should, therefore, decline the City's invitation to consider mere invocation of the government speech doctrine as a blanket, automatic defense to First Amendment claims, but should restrict it to those instances in which government has unambiguously adopted a particular message as its own and is clearly identified on the record as having done so.

Finally, because the present case raises substantial and significant questions of fact as to whether the City did, in fact, adopt the message of the Fraternal Order of Eagles or any of the other messages appearing on privately donated structures as its own, this Court should remand the case back to the District Court for evidentiary findings and trial. As the District Court recognized below, the issue is in material dispute, and the present record is insufficient to establish whether the City intended to communicate a message or whether it loosely granted access to some speakers for permanent access and arbitrarily denied access to the same

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[6] Brief for Petitioners, p. 32

public space to other private speakers for unjustifiable reasons.

ARGUMENT

I. Mere Governmental Ownership Of Property That Advances A Demonstrably Private Message Does Not Establish Adoption Of That Private Speech As "Government Speech."

The central question in this case is whether Pleasant Grove City's grant of access for the display of privately donated monuments in a public park is "government speech" and, if so, whether the City's actions in refusing to accept the Summum monument are nevertheless constitutionally defective.[7] These questions cannot be answered by

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[7] Pleasant Grove City rightly recognizes that this is a free speech "access" case. *See* Petr.'s Br. 19. While the government speech doctrine has only been addressed in a handful of cases by this Court—usually in the context of "compelled" speech—the government speech doctrine has led to considerable differences in interpretation by the federal circuits in a variety of cases. *See, e.g., Turner v. City Council of the City of Fredericksburg*, ___ F.3d ___, 2008 WL 2815041 (4th Cir. 2008) (prayer by city councilman opening city council meeting was "government speech"); *Paramount Land Co. v. Cal. Pistachio Comm'n.*, 491 F.3d 1003 (9th Cir. 2007) (factual differences in actual oversight between the beef promotion scheme in *Johanns* and the pistachio scheme in this case were legally insufficient to justify an injunction); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) ("Choose Life," as it is to appear on the face of Tennessee specialty license plates, is a government-crafted message because Tennessee "sets the overall message to be

communicated and approves every word that is disseminated" on the "Choose Life" plate); *Cochran v. Veneman*, 252 F.Supp.2d 126 (M.D. Pa. 2003), *aff'd sub nom Cochran v. Sec'y of Agriculture*, 2005 WL 2755711 (3d Cir. 2005) (initial finding that Dairy Act promotional program constituted private speech, and thus compelled speech was subject to First Amendment scrutiny, was later reversed in light of the *Johanns* decision); *People For The Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005) (District's Commission on the Arts and Humanities decision to deny a group's sponsorship package was a permissible regulation of "government speech"); *Simpson v. Chesterfield County Bd. of Sup'rs*, 404 F.3d 276 (4th Cir. 2005) (county program inviting outside ministers to provide legislative prayer was "government speech"); *Modrovich v. Allegheny County*, 385 F.3d 397 (3d Cir. 2004) (Ten Commandments plaque donated by private group for display at courthouse constituted impermissible "government speech"); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) ("Choose Life" license plates not "government speech"); *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) (Florida license plate program is structured to benefit the organizations that apply for and sponsor the plates, not the State itself, and there is insufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent "government speech"); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (Ten Commandments monument donated by private group was "government speech" that violated the Establishment Clause); *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757 (7th Cir. 2001) (Coffey, J., dissenting) (choice of campus play was "government speech" because University required performance; was approved by a five-member panel from the University's theater department; was advertised in a school-sponsored newspaper; was subject to University approval; and took place on the campus of the University); *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001) (City of Denver's decision to prohibit a sign promoting

surmise and conjecture, but require careful determination as to whether the City in fact chose to adopt and advance a specific message in permitting private monuments to be permanently displayed in a public forum. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005).

The City contends throughout its brief that when the government selects permanent displays for erection in a government-owned park, "the selection of objects for display in that park is **government speech**, not private speech. No 'forum' for private speech is thereby created." Petr.'s Br. 18.[8] It

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atheist views in a Christmas display was not actionable because the message advanced by the City was the City's message to the community); *Alder v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000) (neutral mechanism whereby the students elect speaker to give an unrestricted message do not establish an utterance of the state and the student's speech is her own); *KKK v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000) (KKK barred from serving as a group underwriter by public radio station denied their support because public underwriting acknowledgements constituted "government speech"); *Avocados Plus Inc. v. Johanns*, 421 F.Supp.2d 45 (D.D.C. 2006) (the Beef Act and the Avocado Act are identical in all relevant aspects, with the Secretary exercising the same degree of control over the Avocado Board as he does over the Beef Board); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F.Supp.2d 98 (D. Mass. 2003) (candy canes distributed with messages at Christmas are not "government speech" per se).

[8] Whether government regulation of private speech violates the First Amendment depends on context. Forum analysis determines whether the speaker speaks in a traditional public forum, a designated public forum, or a non-public forum. It is now axiomatic that in identifying the type of forum, courts consider the nature of the government property in question, the government policy with respect to

contends that other private groups may not in such circumstances "elbow into" such displays and that permitting them to do so would create a "Me too!" and "My turn!" right of access and a "veritable dumping ground" for monuments. *Id.* at 11, 29, 32, 34. The City essentially argues that when government merely accepts a privately donated monument for display, it is free to advance the private speech of others on public property without restraint. But this simplistic, categorical argument—relying more on aphorisms than persuasive analysis—unnecessarily and ill-advisedly cedes free reign to government to show favoritism to the content of specific private messages in a public forum and should be rejected.

Rather than pursuing the black and white approach suggested by the City, more than one jurist has properly recognized that "[w]hat is, and what is not, 'government speech' is a nebulous concept, to say the least." *Sons of Confederate Veterans,* 305 F.3d at 251 (Gregory, J., dissenting from the denial of rehearing en banc). The complexities that arise from private speech on government property are readily apparent in the many lower court cases

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that property, the compatibility of the speech with the forum, and the type of access sought. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). *See also Boos v. Barry*, 485 U.S. 312 (1988); *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *United States v. Grace*, 461 U.S. 171 (1983); *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); *Greer v. Spock*, 424 U.S. 828 (1976). In the present case, the Tenth Circuit determined that the forum consists of "permanent monuments in a city park." *Pleasant Grove City*, 483 F.3d 1044.

involving alleged "governmental messages," transmitted via candy canes, license plates, plays, sponsorships, teacher bulletin boards, holiday displays, legislative prayer, commencement speeches, and economic marketing programs.[9] The issue is complex because "[s]peech in fact can be, at once, that of a private individual and the government." *Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc). Take, for example, the Fraternal Order of Eagles' Ten Commandments monument that Pleasant Grove City permitted to be displayed. Although the City took possession and control of the monument, it ignores reality, as the City appears to do, to deny that:

> The Eagles designed, produced, and donated the Ten Commandments Monument, all with the avowed

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[9] *See, e.g.*, *Turner*, ___ F.3d ___, 2008 WL 2815041; *Lee v. York County Sch. Div.*, 484 F.3d 687 (4th Cir. 2007) (teacher's postings on classroom bulletin board plainly constitute school-sponsored speech bearing the imprimatur of the school); *Paramount Land Co.*, 491 F.3d 1003; *Simpson*, 404 F.3d 276; *Planned Parenthood*, 361 F.3d at 794 (Michael, J.) ("The speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two."); *Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc) ("It is difficult if not impossible to separate sufficiently what is indisputably the speech act by the private speaker from what is equally indisputably the speech act by the government."); *Wells*, 257 F.3d at 1154 (Briscoe, J., dissenting) ("[T]he holiday display is not solely government speech, but contains private speech. . . "); *KKK*, 203 F.3d 1085; *Westfield High Sch. L.I.F.E. Club*, 249 F.Supp.2d 98.

> purpose of providing a moral code for youth to emulate. Indeed, the Eagles presented similar monuments to municipalities across the country, all toward the same aim.... [T]he Eagles, free from any City control, composed the speech contained on the Monument—a fact underlined by the Monument's explicit acknowledgment of the Eagles as the Monument's creators.

Summum v. City of Ogden, 297 F.3d 995, 1004-05 (10th Cir. 2002). The Eagles' efforts were apparently spurred by a desire to improve civic morality. *See Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring) (Fraternal Order of Eagles "sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency."). The extent to which the City sought to foster a similar purpose or to endorse the actual Ten Commandments message engraved on the monument is unknown because the record is inadequate to determine in just what "voice" the City was speaking when it granted access to the Eagles' private display. Petr.'s Br. 28. The District Court in the present case denied judgment on the pleadings and a preliminary injunction because there was a genuine factual dispute concerning whether the City adopted as its own the message advanced by the Fraternal Order of Eagles. It was also unclear whether the *post hoc* adoption and implementation of a policy regarding the erection of permanent monuments in a city park was intended to paper over the alleged viewpoint discrimination. Pet. App. 3b. These issues should not

be finally resolved without careful scrutiny and a complete evidentiary record. *Cf. McCreary County v. ACLU of Ky.*, 545 U.S. 844, 848 (2005) (Court treated *post hoc* resolutions designed to justify the continued erection of monuments of the Ten Commandments with skepticism).

The government speech doctrine has rightly been recognized as "relatively new, and correspondingly imprecise." *Johanns*, 544 U.S. at 574 (Souter, J., dissenting).[10] Because it is relatively undeveloped and the doctrine has immense potential for abuse of individual free speech rights, the conclusory, meat-ax approach advanced by Pleasant Grove City—that expression is "government speech" when government counsel says it is—should be

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[10] The lack of certainty concerning the applicability and boundaries of the government speech doctrine is confirmed by the wide range of diverse opinions in the federal circuits. Aside from the numerous differing opinions produced by the Tenth Circuit in this case, the Fourth Circuit has also struggled for coherence on the doctrine. *See, e.g., Sons of Confederate Veterans*, 305 F.3d 241 and *Planned Parenthood*, 361 F.3d 786. The panel decision in the *Sons of Confederate Veterans* case, written by Judge Williams, was unanimous, but the petition for rehearing en banc, denied by a vote of 6-5, revealed the uncertainties. Judges Wilkinson and Luttig wrote opinions concurring in denial, while Judges Niemeyer and Gregory each wrote separate dissenting opinions. In the *Planned Parenthood* case, the panel hearing the case published three separate opinions, and on petition for rehearing en banc, denied by a vote of 8-5, Judge Wilkinson wrote an opinion concurring in the denial and Judge Shedd wrote an opinion dissenting from denial of rehearing en banc, which was joined by Judge Williams.

rejected for a more deliberate and discriminate development of this nascent area of the law. There is no reason to adopt the suggested blanket exemption from conventional, accepted free speech standards formulated by this Court over the last seventy years. This case can, and should, be decided on careful application of those standards and by elaborating further on standards as to what is and is not "government speech."

There is no question that government has the right to communicate its own message in the public square or that when government itself speaks, it has discretion to discriminate as to both content and viewpoint. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). But the complex inter-relationships between government and the private sector and the continuous intersection of government with individuals on public property and at public events frequently create ambiguities as to whether a message is essentially a private or a public one. Government may be merely accommodating private speech, facilitating or even endorsing the advancement of a private message, or it may be promulgating a truly governmental message. Conversely, the voice of government may very easily be advanced in league with private entities in a manner that evidences no discernable connection of the message with government.[11] Private entities may thus assume

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[11] For examples of government's use of private actors to advance its anti-drug message, *see* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 Hastings L.J. 983 (2005). "Under a little-known agreement with the major television networks, the White House Office of National Drug Control Policy reviewed the scripts of more than 100

roles as government advocates or unidentified surrogates, disseminating messages that are difficult to trace back to their public author. In other words, the line between public speech and private speech rights is often very difficult to discern. Any doctrinal lines that are drawn should, therefore, be clearly defined as to what is and is not "government speech," as well as regarding the extent to which government may impinge upon private speech rights when it advances the message of another private party in a public forum, as opposed to its own.

When government asserts that an expressly private message is its own, "disfavored" private speech becomes subject to onerous burdens. With no First Amendment restrictions, government is free to devote the full resources of its funding and property to the advancement of a particular viewpoint in a public forum, effectively limiting the access and ability of other speakers to express conflicting messages. The proposed expansion of the government speech doctrine advanced by Pleasant Grove City would allow government, when challenged, to argue that the acceptance, ownership, control, and display of a privately donated monument on City property transforms the "voice" of the donor and its message on the donated monument into "government speech." Thus, with no formal adoption of the message and despite engraved markings on the Ten Commandments monument

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episodes of television shows such as "E.R.," "Beverly Hills 90210," and "Cosby."... In exchange for broadcasting programming that the White House found to convey "proper" anti-drug messages, the networks received more than $20 million worth of credit for required public service broadcasting." *Id.*

identifying the speech as that of the Eagles, the City nevertheless contends that its mere decision to permit the display removes it from First Amendment purview and provides sufficient grounds for it to exclude others from advancing opposing or conflicting, or even consonant, messages in the public square because the monument is ostensibly "government speech." Teaming up with favored private groups such as the Eagles or the Boy Scouts, the City is thus empowered to distort opportunities for speech in the public square, granting access for the express messages of those private groups but escaping scrutiny under the First Amendment for failing to accommodate others. Such blurring of the lines represents a serious affront to First Amendment rights and, if taken to its logical conclusion, would permit government to act as the unrestrained arbiter of private speech displayed permanently in public places.

The principal purpose of public fora—the free exchange of ideas—is unduly compromised by the indiscriminate and wholesale expansion of the government speech doctrine suggested by Pleasant Grove City. It is well-established that speakers can only be excluded from a traditional or limited public forum when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *See, e.g., Cornelius*, 473 U.S. at 800. Even if government may, as Judge McConnell suggests, "create designated public forums with respect to fixed monuments,"[12] if it permits private groups to advance messages in

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[12] *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007) (McConnell, J., dissenting from the denial of rehearing en banc).

such places, it has created a designated public forum where, again, government is not permitted to discriminate as to content without demonstrating a compelling state interest.

The City suggests that its obvious ownership and control of the monuments transforms them into "government speech," but government does not speak simply because it owns a physical object that may convey speech. As Chief Judge Tacha said:

> This approach is an unprecedented, and dangerous, extension of the government speech doctrine. To make government ownership of the physical vehicle for the speech a threshold question would turn essentially all government-funded speech into government speech. But this would be an absurd result. No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text. This is because the speech conveyed by the physical text remains private speech regardless of government ownership.

Pleasant Grove City, 499 F.3d at 1179 (Tacha, C.J., response to dissent from denial of rehearing en banc). Instead, as has been explained, the appropriate and critical inquiry is whether the message is a government-crafted message. *See, e.g.*, *Johanns*, 544 U.S. at 560 (holding that the beef advertising campaign constituted "government speech" because the "message set out in the beef promotions is from beginning to end the message established by the Federal Government.").

Pleasant Grove City's position also opens the door for mass viewpoint discrimination, leaving it free to "accept any private message as its own without subjecting the message to the political process, a result that would shield the government from First Amendment scrutiny *and* democratic accountability." *Pleasant Grove City*, 499 F.3d at 1180 (Tacha, C.J., response to dissent from denial of rehearing en banc) (emphasis added). To ensure political accountability, therefore, it is important to require Pleasant Grove City to demonstrate that it did in fact adopt the private speech displayed on the monuments in the park as its own speech. If it did, there would be no First Amendment claim for viewpoint discrimination. If it did not (because the display of the Ten Commandments was not clearly "government speech"), it would be private speech or, as Judge Luttig and others have suggested, a "hybrid" of government and private speech[13] (where government has opened access to government property for messages with both private and public content). These latter situations demand careful scrutiny. Here, the courts must ask whether the City favored messages on the other monuments (either by arbitrarily granting one speaker permanent access to public property to advance a message or

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[13] Although this Court has never recognized the concept of "hybrid speech," the idea that speech can be both private and governmental at the same time receives considerable support in the federal circuits. *See, e.g., Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc) ("[T]he particular speech at issue in this case is neither exclusively that of the private individual nor exclusively that of the government, but, rather, hybrid speech of both.").

through animus against Summum's message) crossing over into unlawful viewpoint discrimination.

Unless there are to be no standards for governmental action, two questions cannot be resolved on the present record in this case. One, did Pleasant Grove City *actually adopt* the messages on the monuments in the city park as its own speech? Second, if not, did the City give more favorable access to one private view over another in a public forum? No determination can be made of the City's rejection of the proposed Summum monument without further fact-finding as to these questions. For this reason, the case should be remanded with instructions to establish a record on which the case can be properly disposed.

II. The Government Speech Doctrine Should Not Be Expanded To Allow "Favored" Speech To Be Shielded From First Amendment Scrutiny And To Remove Protections Afforded To "Disfavored" Speech.

Equality of access and government neutrality toward the expression of viewpoints in the public square lie at the heart of the First Amendment. As Professor Frederick Schauer has observed:

> [A]lthough... drawing distinctions is an inevitable part of the legislative, regulatory, and judicial enterprises, there remains a pervasive American

> suspicion of official valuation of ideas and enterprises. And while the libertarian culture that such attitudes of distrust engender is hardly restricted to freedom of communication, this skepticism about the ability of any governmental institution reliably to distinguish the good from the bad, the true from the false, and the sound from the unsound finds its most comfortable home in the First Amendment.[14]

In a similar vein, writing in a difficult case involving a state legislature's decision to deny the Confederate Flag symbol on a vanity license plate, Judge Wilkinson expressed concern that "[w]hen a legislative majority singles out a minority viewpoint in such pointed fashion, free speech values cannot help but be implicated."[15] Judge Wilkinson explained his concern as follows:

> [T]he First Amendment was not written for the vast majority.... It belongs to a single minority of one. It is easy enough for us as judges to uphold expression with which we personally agree, or speech we know will meet with general

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[14] Frederick Schauer, *The Exceptional First Amendment*, Faculty Research Working Papers, JFK School of Government (February 2005), at 24, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract-id=668543 (last viewed June 11, 2008).

[15] *Sons of Confederate Veterans*, 305 F.3d at 242 (Wilkinson, C.J., concurring in the denial of rehearing en banc).

> approbation. Yet pleasing speech is not the kind that needs protection.
>
> Our Constitution safeguards contrarian speech for several reasons. As the Civil Rights Movement demonstrates, yesterday's protest can become tomorrow's law and wisdom. Other contrarian speech should move popular majorities to reaffirm their own beliefs rather than suppress those of others. The reminders of history's most tragic errors only deepen our commitment to the dignity of all citizens: The Constitution that houses the First Amendment also shelters the Fourteenth, an everlasting reminder that a nation betrothed to liberty and equal justice under law must remain vigilant to realize both.

Sons of Confederate Veterans, 305 F.3d at 242 (Wilkinson, C.J., concurring in the denial of rehearing en banc). Moreover, the affront is more readily apparent when the private speech being favored or disfavored falls into certain categories. Elsewhere, Judge Wilkinson has noted that "[i]t is one thing for states to use license plates to celebrate birds and butterflies, military service, historical events and scenic vistas. It is quite another for the state to privilege private speech on one side—and one side only—of a fundamental moral, religious, or political controversy." *Planned Parenthood of S.C., Inc. v. Rose*, 373 F.3d 580, 581 (4th Cir. 2004)

(Wilkinson, J., concurring in the denial of rehearing en banc).

If this Court denies the display of Summum's monument, it implies that the Summum monument is an unwelcome view, unworthy of equality or consideration. But, as Judge Wilkinson opined:

> The fact that Americans have deep differences of opinion... is all the more reason to recognize the unifying force of the First Amendment principle—namely, that none of us has the right to compel assent to our views, but that all of us have the right to express them. The state's failure to be neutral on the right to speak about our most divisive issues will give rise to great resentment. The confidence that all are treated equally with respect to belief, conscience, and expression enables Americans to transcend difference and to make "e pluribus unum" the lasting legacy of our nation.

Id. at 581-82. This does not mean that every citizen or community group has the right to install a permanent monument in the public square. It does mean, however, that the burden is on government to make clear, when it grants permanent access to a *private* group to advance a private message, what its reasons are for doing so, as well as to justify the basis for denying access to other groups or messages.

The problem in this case is that the City's argument on its role in accepting the display is highly ambiguous and conflicted, undermining the

ostensible protection of political accountability. On the one hand, the City suggests that its mere grant of access to the Fraternal Order of Eagles for the permanent display of its Ten Commandments monument transforms it into "government speech." Petr.'s Br. 20-39. Conversely, at the same time, the City contends that its grant of access for the display was done "without necessarily subscribing to the precise messages engraved thereon." *Id.* at 32. The City thus asks this Court to create a new fiction of law for "government speech." The fiction would give government a free pass under the First Amendment for *private* speech that government chooses to display, while at the same time permit government to disclaim that it subscribes to the precise message advanced by the private group. Thus, the publicly displayed private message would be "government speech" because government permits it to be displayed, but not in the sense that it reflects a "governmental message." The fine tuning of this legal fiction is almost incomprehensible and should, therefore, be rejected. For purposes of the First Amendment, speech should either be truly "government speech" or, if not, should be governed by conventional free speech standards. Accordingly, this Court should reject Pleasant Grove City's invitation to transform the government speech doctrine into a convenient rubber stamp for government to reject disfavored private speech at will. It is a fundamental First Amendment principle that government action imposing state orthodoxy, censoring speech based on content, or favoring speakers or viewpoints should be subject to rigorous scrutiny. If its power is to be without limits (as the City suggests), the government speech doctrine will

provide an unrestricted and convenient means to advance state orthodoxy and silence disfavored messages, diluting First Amendment protections and threatening the vitality of free speech.[16] If government is to speak through private means and permit domination of the public square by such means, it should be required as a constitutional matter to adopt formally the privately promoted message as its own or at least state a reasonable, viewpoint-neutral justification for doing so.

III. Misapplication Of The Government Speech Doctrine Improperly Immunizes Government From Political Accountability, In Violation Of Constitutional Principles Otherwise Undergirding The Doctrine.

There is a further sound reason for the requirement that government clearly identify speech as its own: political accountability. Individuals generally have no constitutional right to challenge "government speech" under the Free Speech Clause. The justification for the "government speech" exemption is that "government speech" is ordinarily subject to the political scrutiny and accountability

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[16] It is important to remember that "[t]he First Amendment is often inconvenient.... Inconvenience does not absolve the government of its obligation to tolerate speech." *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701 (1992) (Kennedy, J., concurring in judgment).

that is part and parcel of the First Amendment's Petition Clause:

> The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541-42 (2001) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). However, when the government hides its actions and messages from political accountability behind the veil of private party speech, it transgresses the constitutional and democratic values that purportedly undergird the government speech doctrine. When the political safeguards that justify "government speech" are removed, the government should not be afforded such discretion and latitude. In such circumstances, the protective shield of the government speech doctrine should be set aside to prevent discriminatory decision-making.

When government grants access to public property for speech in which it participates with private groups, that speech should not benefit from a jurisprudential designation of "government speech"

unless (1) that speech is transparently advanced by government on the public record as its own, and (2) any private message that is adopted as its own advances a legitimate, rationally-related, non-discriminatory governmental purpose.

By cloaking public messages with private voices, government may surreptitiously distort discourse in the public square, potentially skewing the political process. Non-transparent governmental communication more easily permits government to avoid the repercussions of unpopular speech. Furthermore, while the government is likely to associate itself with a popular message, it can minimize the political ramifications of an unpopular message simply by advancing its interests covertly, through a private speaker.[17] This contradicts the political accountability that has been recognized as "so essential to our liberty and republican form of government." *Alden v. Maine*, 527 U.S. 706, 751 (1999). As Justice Souter has asked, if "[n]o one hearing a commercial for Pepsi or Levi's thinks Uncle Sam is talking behind the curtain... [w]hy would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?" *Johanns*, 544 U.S. at 577-78 (Souter, J., dissenting). The extension of this deception into the everyday lives of this country's citizens, particularly in an age of anonymous technological communication, is of legitimate constitutional concern.

Lack of political accountability reaches its zenith when the public is unaware that viewpoint discrimination has occurred, especially when the government has a virtual monopoly on the forum and can use private surrogates as mouthpieces, with

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[17] Lee, *supra* note 13.

no need for identification of the actual source of the message. Justice Souter identified such concerns in his *Johanns* dissent: "[I]f government relies on the government speech doctrine... it must make itself politically accountable by indicating that the content actually is a government message...." *Johanns*, 544 U.S. at 571 (Souter, J., dissenting). Government is best conducted in the sunlight; negation of free speech protections under the government speech doctrine should be legitimized only when government acts transparently in formally adopting a message as its own.

If the speech of private groups under the First Amendment is to be subordinated and suppressed in the name of "government speech" because of the ostensible protection of political accountability, then it should be done only when "government speech" is transparently and unequivocally governmental. Citizens who object to the government's message may then elect new representatives if a particular governmental message is offensive. Allowing government to cloak its advocacy and at the same time be exempt from First Amendment restrictions dilutes, and even removes, traditional political controls and mocks an essential underpinning of democracy, i.e., the transparency necessary for government to work.[18] Moreover, the "First Amendment harm cannot be mitigated by the possibility that a few cognoscenti may actually understand how the [government speech] scheme works." *Johanns*, 544 U.S. at 579 (Souter, J.,

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[18] *See Planned Parenthood*, 361 F.3d at 795-96 ("The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process.").

dissenting). There needs to be "a practical opportunity for political response; esoteric knowledge on the part of a few will not do." *Id.*

If government is clearly advocating a message that it has adopted as its own, it should be able to plead the "government speech" defense. If government cannot satisfy this threshold, it should not be permitted to do so. Shielding a private party's speech from First Amendment scrutiny by false labeling is constitutionally mendacious. Indeed, such a tactic is entirely at odds with substantive First Amendment principles.

Amicus does not suggest that the government speech doctrine be abandoned, but rather that it be developed with great care and scrutiny in view of its potential for abuse. To protect private speech rights, *Amicus* suggests that in order to invoke the "government speech" exemption for the permanent display of a privately donated monument, government must fully adopt, and identify itself as adopting, the private message as its own. Furthermore, it must justify the display by a legitimate, rationally related, non-discriminatory governmental purpose. These requirements would minimize the risk that disfavored speech could be easily discriminated against by cloaking a favored message under the pretense of "government speech." They would also ensure that the audience is provided with a reasonable opportunity to know that the government is speaking so that it may be held politically accountable for its message.

CONCLUSION

For the aforementioned reasons, therefore, this Court should remand the case back to the District Court for further fact-finding into whether the City adopted the messages displayed on the monuments as its own speech and to apply whatever standards this Court determines to dispose properly of the case.

Respectfully submitted,

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